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INTERNATIONAL COMMISSION OF JURISTS - GENEVA

ECONOMIC CRIMES IN THE SOVIET UNION

The object of this study is, firstly, to examine the content and the application of recent legislation in the Soviet Union concerning economic crimes and the place of this legislation according to recent legal theory and, secondly, the extent to which the repression of economic crimes is linked with anti-Semitism will be considered.

In order to evaluate the recent legislation on economic crimes it is necessary to give a brief account of the main trends of Soviet penal policy and of the socio-political significance of the prevalence of economic crimes as shown both by the exceptional measures adopted to deal with this problem and by the reports of large-scale defalcations at the very heart of the public economy. It will also be necessary to examine a number of features of Soviet public life which to a jurist or a member of the public unfamiliar with the Soviet system would not at first sight appear to be important. Thus, e.g., the way in which cases concerning economic crimes are reported in the Soviet press is much more significant than the law reporting of the press in the Western world. The role of the press in a Communist society includes the task of education and indoctrination, both functions being carried out under the auspices of the Communist Party. When the characteristics of Soviet reporting on economic crimes are examined, it is important to remember that these characteristics are part of a pattern set up by the State for mobilizing opinion on economic crimes in a particular direction. The reader will look in vain for on the one hand a merely factual and on the other a complete account of those features of the case which would be of interest to the legal scholar or the sociologist. Therefore, whilst the reports in the Soviet press give nothing like a complete picture of all the relevant facts on cases involving economic crimes, they do, however, give the picture which the authorities wish to convey for the purpose of mobilizing the people against economic crimes. As will be seen, a thoroughly disproportionate emphasis is placed on the fact that some defendants are Jewish and the comment made by the press on economic criminals regularly emphasizes characteristics in the accused which are traditionally associated in the public mind with the Jew through te ages..

1. Reform of Criminal Law and Procedure in the USSR

This was an important part of the programme of extensive legal reforms undertaken by the Soviet Government and the Communist Party of the Soviet Union after the death of Stalin. The purpose of this programme was to repair the damage caused to the Soviet ship of State by the "personality cult", a brand name for policies and governmental techniques, which under Stalin's regime relied on the use of force and dictatorial government with little respect for the Rule of Law and democratic processes. The essence of the reform was, to summarise it in a short sentence, that the Soviet government wanted to rule through enforcement of the law, and the content of law thus becomes more important than hitherto.

But before the goal of legality could be fully achieved, Soviet laws in practically all departments of government and social activity had to be put in order. It was the considered opinion of Soviet scholars that one of the factors facilitating Stalin's misrule was the disorderly state of Soviet law.¹ As a result the Twentieth Party Congress (1956), reflecting this conviction, demanded that the new Civil and Criminal (substantive and procedural) Codes and other major pieces of legislation be enacted to replace the Stalinist laws, which were not only crude and outdated, but misshapen by constant additions to their provisions. The new, more liberal legal system was to reflect the new social and economic reality, which was the result of the greater maturity of the Soviet people and the achievements of socialist construction.

In the programme of liberalization, new criminal legislation was a most urgent necessity, and the first step in the reform was to enact in December 1958 a series of laws, some of them outlining the principles of Soviet criminal legislation to be incorporated in the final and complete codes, and some providing for the punishment of crimes of federal concern (anti-state and military). These laws were followed by the new codes, enacted for each member republic, with the 1960 Criminal Code of the Russian Soviet Federated Socialist Republic (RSFSR) as the model for the other republics.

In some respects the new codes have introduced for the first time in Soviet Russia some of the principles of enlightened criminal policy. For example, criminality by analogy, which permitted punishment without a specific offence, was abolished. The principle that laws must not be retroactive was upheld in Article 3, which stated that "only persons guilty of committing a crime, that is, those

¹ Orlovskii, "Zadatchi pravovoi nauki v svete resheni XX sjezda KPSS," *Vestnik Akademii Nauk SSSR*, 1956, No. 8, p.

who intentionally or by negligence have committed a socially dangerous act specified by the criminal law, shall be held responsible and shall incur punishment". Article 6 of the Principles of the RSFSR Code stated unequivocally, that "whether an act is criminal and punishable is determined by the law which is in force at the time of its commission . . . a law which makes an action punishable or increases the penalty has no retroactive force". Furthermore, the General Principles, and after them the codes, reduced the application of the death penalty to a number of strictly limited offences.

In the same spirit the decree of the Presidium of the Supreme Soviet of January 13, 1960, guaranteed impunity to Soviet citizens who, although recruited by foreign espionage services, had since desisted from espionage activities, provided that they promptly notified the authorities about their connections with foreign espionage.²

Under the instructions of the Twentieth Party Congress the legislative reform was concerned with reproducing judicial guarantees within the context of the Soviet legal system, bringing Soviet legislation, in some respects at least, to the levels prevailing in the West. The decisions of the Twenty-First Party Congress (1959) changed the perspective. Under its instructions the reform of the legal system has acquired a new sense, because, as the Congress stated, the time has come to reorganize all phases of Soviet life in order to move further ahead on the road to communism and to introduce new standards of social and personal behaviour.

2. New Legal Trends and Economic Crimes

The first important departure from the principles laid down for future application in the criminal law came with the anti-parasite legislation and laws on the participation of society in crime prevention. This was soon followed by radical campaigns aimed at the suppression by exceptional means of crimes which had become a particular thorn in the flesh of the Soviet authorities. Special criminal legislation was introduced which departed from the principles established by the 1958 legislation and the codes of 1960 in two important respects. Firstly, the principle that Soviet criminal legislation would be stable and criminal policy general rather than concentrating on specific problems was not followed. Secondly, and this was a major feature of the special decrees, the death penalty was introduced on a large scale despite the principle laid down in Article 22 of the General Principles that the death penalty would be used only exceptionally and for the most serious offences, with a view eventually to abolishing it entirely.

The first of these Decrees, dated March 25, 1961, added a

² *Vedomosti Verkhovnoy Soveta*, 1960, No. 3/24.

second paragraph to Article 25 of the Law on Crimes against the State of December 1958 (Article 88 of the Criminal Code of the RSFSR of 1960), which sharply increased penalties for illegal currency transactions either when committed by a professional criminal or when large sums of money were involved.³

Next came the Decree of May 5, 1961, which introduced the death penalty by shooting for a number of crimes, including large-scale theft of state and social property, professional counterfeiting, and other crimes committed by dangerous recidivists, or persons serving sentences for serious crimes.⁴ The Decree of May 24, 1961, penalized fraud in planning accounts.⁵ The Decree of July 1, 1961, again raised the penalties for serious forms of illegal currency transactions, providing for the application of capital punishment in more serious cases.⁶ A Decree of February 15, 1962, introduced new rules aimed at the protection of the members of the militia and the members of the Voluntary People's Brigades (an auxiliary police force).⁷ This Decree was followed the same day by a Decree which introduced the death penalty for aggravated cases of rape (committed by a dangerous recidivist, or a gang).⁸ Finally, a Decree of February 20, 1962, provided for increased penalties, including also the death penalty, for officials accepting bribes.⁹

Thus the sharp edge of exceptionally severe punishment was not aimed exclusively at offenders against the economic interests of the Soviet State. It was also concerned with affording special protection to new forms of social discipline which had been introduced by the legislation on the participation of the population in crime prevention (Decree of February 15, 1962). It also singled out for harsher treatment incorrigible criminals and certain forms of criminal activity. In addition Soviet special decrees were also concerned with the protection of inmates of penal institutions and of the administrative personnel employed in such establishments against the attacks of hardened and particularly dangerous criminals.

The exceptional decrees in all their categories reflect the sense of disillusion over the corrective effect of normal measures in protecting certain important social interests. They demonstrate a doubt whether some criminals (recidivists and professionals) can be morally rehabilitated. They also are designed to convince the public that the use of the auxiliary police force in order to establish a system of tight supervision over the activities of all citizens, even

³ *Ibid.*, 1961, No. 13/137.

⁴ *Ibid.*, 1961, No. 19/207.

⁵ *Ibid.*, 1961, No. 22/225.

⁶ *Ibid.*, 1961, No. 27/291.

⁷ *Ibid.*, 1962, No. 8/83.

⁸ *Ibid.*, 1962, No. 8/84.

⁹ *Ibid.*, 1962, No. 8/85.

in their private life, is a measure to which the regime attaches great significance. The death penalty provided for attacks on members of the militia and of the auxiliary police force is used as a deterrent. The death penalty is provided for breaches of discipline by certain inmates of corrective institutions.

There seems also to be little doubt that harsh punishments for economic crimes, theft and embezzlement of government and social property, trade with foreign currencies, gold and securities, and giving and taking of bribes are also designed to deter rather than to correct. Their main purpose is to keep the potential offenders on the path of virtue by fear.

Another important feature of the special legislation enacted in 1961 and 1962 is that in the eyes of the regime economic crimes represented a singular danger to its plans and interests. Of the seven special decrees, two dealt with illegal currency transactions, one with counterfeiting, theft of state or social property, one with fraud in planning accounts, and one with bribery of officials.

It is clear that the policy of using special decrees to amend the Criminal Codes in a spirit contrary to the original aims of the legal reform has established itself in the Soviet legal system, probably because of the apprehensions caused by popular reaction to the milder course. The system of harsh penalties for economic crimes brings readily to mind the special measures which were usually the feature of Communist legislation directed against class enemies in order to enforce the transfer to public ownership of privately-owned factories and commercial institutions. Now, after more than forty years of the Soviet regime, special legislation cannot be explained by the presence of the class enemy, but must be attributed to other causes no less dangerous to the interests of the Soviet policy. It is clear that the purpose of the decrees is to deal with a phenomenon which is a serious threat to the social and economic order. That economic crimes for a number of reasons figured chiefly in the mind of the regime is attested by the instructions of the plenary session of the USSR Supreme Court, which pointed out to the courts that the vast punitive powers given to the courts are meant to be used in the struggle with economic crimes. After the decrees of May and July 1961, the Court pointed out:

... in hearing cases of (especially dangerous) crimes the courts commit serious errors, which consist of underappraisal of the social danger of these crimes and the resultant imposition of light penalties, particularly in cases of pilfering state or public property in especially large amounts.¹⁰

For the purpose of the present report four types of criminal offences defined in special legislation are of importance:

Speculation in currency, gold or securities, professionally or

¹⁰ *Pravda*, September 4, 1961.

on a major scale, and violation of currency regulations by a person who was already punished for such a violation (Decrees of March 25, 1961, and July 1, 1961); theft and pilfering of state and social property (Decree of May 5, 1961); counterfeiting of currency and securities for sale, or the sale of such counterfeit articles (Decree of May 11, 1961); bribe-taking by an official personally, or through intermediaries, in whatever form, for performing, or not performing, to the advantage of the person giving the bribe, an act which the official should have performed in the course of his official duty (Decree of February 20, 1962).

For all these crimes the special decrees provide maximum penalties of a loss of freedom up to fifteen years, or death by shooting.

None of the special decrees imposes the death penalty as an exclusive and mandatory form of punishment. The Soviet judge is given a choice in sentencing. For instance, the decree providing higher penalties for bribe-taking states that, in cases when the crime is committed by a person in a "responsible" position, or by an official who has already been sentenced for bribery, or who has taken bribes several times, or when the bribe-taker has extorted the bribe, the penalty is deprivation of liberty for eight to fifteen years or death.

The history of the punishments for bribe-taking in the Soviet Union will illustrate the sense of the special decree of February 20, 1962. In the early years following the October revolution bribery was regarded as one of the pernicious legacies of Tsarism, and the RSFSR Criminal Code of 1922 retained the death penalty for persons in official positions found guilty of accepting bribes. When capital punishment was abolished in November 1927 for a large number of crimes, the penalty for bribery was changed to a maximum of ten years deprivation of freedom. This remained in force until the end of 1960, when Article 173 of the new RSFSR Criminal Code reduced the maximum sentence to five years and imposed five to ten years for a second conviction, or for bribery with extortion. Now the penalties are as follows: three to ten years deprivation of freedom for minor officials, and eight to fifteen, with confiscation of property, for those in responsible positions, confirmed bribe-takers (recidivists), or those guilty of extortion. In certain cases, two to five years' deportation are added on to the prison sentence. In particularly bad cases, a death sentence can be imposed.

Sentences on persons acting as intermediaries and those offering bribes are also much harsher. In the first instance the penalty for a single offence is from two to eight years deprivation of freedom, and for repeated offences and a second conviction, from seven to

fifteen years, with confiscation of property, and in certain cases, deportation from two to five years. A conviction for offering bribes on one occasion carries a sentence of three to eight years and for repeated offences or for a second conviction of seven to fifteen years with loss of property.

The definition of crimes in the special decrees is in keeping with the general style of the legislative enactments of December 25, 1958, and of the Code of 1960. Whilst Soviet legislators are less inclined now than they were in the Stalinist period to use broad definitions or omnibus clauses, they are little concerned with legalistic precision. The terms defining various criminal offences are employed in their everyday meaning, which allows the inclusion under one term of all types of criminal acts, which in a more orthodox piece of legislation would call for a number of technical definitions. So, for instance, the term "khishchenie" from the Decree of May 5, 1961, on the intensification of the struggle against singularly had crimes, covers all types of criminal attacks on government and social property, including theft, embezzlement, fraud, abuse of position of trust, etc.

Similarly the provisions of the two Decrees of March and July 1961 concerning criminal liability for violation of the government monopoly of dealings in foreign currencies and securities display little consistency in their terminology, although it is clear that they refer to the same type of prohibited action. The March Decree speaks of "speculation in currencies and securities", whilst the July enactment is concerned not only with "speculation" in the sense that this term is used in the March Decree, but also covers "violation of regulations concerning *valuta* operations" which amounts to the same thing. Both "speculation" and "violation of regulations concerning *valuta* operations" cover a great many situations which may give rise to criminal prosecutions and convictions. Their main danger for the private citizen is in the vague terms used in the law. Whilst the legislative technique employed by the Soviet legislator reflects Soviet conditions, with a scarcity of lawyers in the legislative bodies themselves as well as in the courts, a secondary purpose of the regime is also served. Such legal provisions, particularly those of the criminal codes, easily lend themselves to manipulation by the prosecution and the courts and the defendant is deprived of that degree of strict legality which is the essence of properly drafted legislation.

The real significance of the special decrees comes fully to light when considered in the perspective of the employment of the death penalty in the Soviet Union. It is the use made of this punishment which shows its role in penal and social policy. In terms of the basic principles of Marxist ideology punishment by death has no room in Soviet society as a regular instrument of penal policy.

There may be some justification for it in the period of revolutionary struggle with the class enemy. Once, however, the socialist order is established, and the demoralizing effects of private ownership of the means of production disappear as a social and economic phenomenon, it is only a question of time before all moral and social illnesses of the capitalist order of things disappear. The state monopoly of education, in formulating the moral code, the healing effects of socially useful labour, all contribute to the gradual restriction and eventual disappearance of criminal activity.

This basic article of faith has not, however, been forgotten. Although the death penalty represents one of the most important instruments of penal policy, without which it seems that the Soviet Union is not yet able to deal with the social and political hazards facing the regime, its use is always combined with the promise of its future abolition. Article 23 of the 1960 Criminal Code of the RSFSR (Article 22 of the General Principles) contains a typical formula, combining the authorization to resort to the death penalty with the ritualistic genuflection in the direction of the theory that its use has no place in the Communist State:

Application of the death penalty – by shooting – is admitted as an exceptional penal measure, pending its final abolition. . .

The Article suggests that the death penalty has a highly restricted and temporary application. It further implies that the situation of Soviet criminal policy as established by the Code is a phase in the process of its progressive abolition, and that the application of the death penalty in the present situation is only a concession to temporary expediency.

The death penalty was abolished in 1917, reintroduced some months later in 1918, reabolished in 1920 and again reintroduced the same year. Its use was gradually expanded under Stalin's regime, and at one time it was provided as the standard penalty for some 74 crimes. The next experiment with the abolition of the death penalty came after World War II. In May 1947, the death penalty was abolished in recognition of the loyalty of the people to the Soviet homeland and the State. It was reintroduced in January 1950 to apply to a rather broad category of criminals, enemies of the regime, "traitors", spies and "subversive-diversionists". In 1954, after Stalin's death, its application was again expanded, this time as punishment for murder under aggravated circumstances, and it was retained for the most serious crimes in the 1958 General Principles of Criminal Legislation of the USSR and of the Union Republics, and in an unchanged form included in the Criminal Codes of the various republics. In this form, the death penalty was given an orthodox role as a deterrent against attacks upon some most important values, and was deprived of its character, which it had frequently in its early career in the Soviet policy, as an emergency

measure for the enforcement of government policy.

As used in the special decrees enacted in the 1961-62 period, the death penalty clearly represents a partial return to the penal policies of the early years of the Stalinist period. This was the period of radical changes, when the Soviet regime embarked on rapid expansion of the industrial sector of the national economy and of the skilled labour force, and set out to enforce new standards of social discipline in Soviet society. The economy was being geared to central planning and collectivization of the most important branches of economic activity. The success of the new economic policies was dependent upon the successful expansion of the Soviet city population, which also meant controls over available accommodation, and instilling into the illiterate peasantry the mores and habits of the industrial population.

Whilst it is easy to discern in terms of legal techniques parallel features in Stalin's exceptional legislation, and in Krushchev's exceptional decrees on economic crimes in the 1961-62 period, there is no analogy in the social and economic conditions of Soviet society in the two periods, separated by more than twenty years. With all its shortcomings and difficulties, the current economic situation of the Soviet Union is the image of success compared with the condition of the Soviet social and economic order under Stalin prior to World War II. Difficulties in the management of the national economy, the low level of expertise of the economic bureaucracy, failures in the achievement of the targets set for various industrial branches do not by themselves explain the enactment of special legislation or the extended application of the death penalty at the present moment.

N. R. Mironov, Head of the Section for Administrative Organs in the Central Committee of the Communist Party of the Soviet Union explained in 1962 that:

It is not the incidence (of particularly dangerous crimes) which had grown, but rather the implacability of the Soviet people to all elements that bring shame on Soviet society and mar Soviet life. . . . Some people think that the intensification of judicial repression affecting especially dangerous crimes does not correspond to the character of our state and contradicts the course taken by the Party towards further restriction of the state's administrative and punitive functions and their gradual replacement by the methods of public influence and indoctrination. It is impossible to agree with this.

In fact, Mironov asserts, although the number of criminals is comparatively insignificant, these few who still continue their criminal activities cannot be deterred except by the threat of physical destruction.¹¹ To refute Mironov's arguments it is not necessary to search far and wide for evidence that it is not society itself which

¹¹ *Partiinaiia Zhizn*, 1962, No. 5.

demanded harsher measures. The new decrees were conceived at the highest level of Party and governmental leadership in order to awaken the public, which has remained indifferent to the wide-scale abuses taking place in the Soviet economy. It does not sound convincing to say that criminality is confined to a small group of hardened criminals who need to be threatened with extermination before they will desist from their obnoxious activities. The death penalty is the type of deterrent used to halt really dangerous criminal activity, to rouse the public, and make it aware of the fact that abuses in the national economy threaten progress towards higher standards of living. The social enemy in this case is not the small criminal group operating on the fringes of the social order, but those who by their position in the social and economic structure in the Soviet Union are able to cause great damage to the economic and social interests of Soviet society. The very tone of the Soviet press campaign concerned with the prosecution of economic offences confirms the suspicion that the educational action of the Soviet courts and of the press is addressed to the people at large.¹² It is the people at large who must be reminded of the fact that under the new regime after Stalin's death, postulates of social discipline formulated under his rule are still valid, including the sanctity of socialist property, the discipline of work and above all that the initiative for the expansion of industrial, and indeed of all economic activity, is monopolized in the hands of the state. Finally, it should be mentioned that the legislation on economic crimes, though incorporated in the Criminal Codes of the Republics, is nationwide; it is part of the Law on State Crime. A Decree of June 27, 1961, gave the KGB (security police) the right to investigate a whole series of economic crimes;¹³ they had begun to file charges publicly the previous month.¹⁴

3. Judicial Techniques in the Soviet Union

What follows is no doubt commonplace to the Sovietologist, but for those who are unfamiliar with the machinery of justice in the Soviet Union some explanation is necessary on the background of judicial procedure.

It must be realized that in spite of the constitutionally guaranteed independence of judges, the Soviet judge is exposed to influences from various sources. In the first place he is bound by the instructions and directives issued by the Supreme Court, which periodically reviews the activity of the lower courts to analyse their activity and to correct their mistakes. The attitude of the courts is

¹² *Ibid.*

¹³ *Vedomosti, op. cit.*, 1961, No. 26, item 270.

¹⁴ See *Sovetskaya Kirghizia*, May 25, 1961, *Sovetskaya Belorussia*, May 27, 1961.

also shaped by press reports, which provide much but incomplete information of the cases heard and disposed of in other courts, and introduces a heavily weighted propaganda in so doing.

The Supreme Court of the USSR has given clear directions to the lower courts to use every opportunity to stamp out economic crimes from the life of the Soviet Union. It urged an intensified struggle against economic crimes in its three regular plenary sessions held in September 1961, March 1962, and October 1963. The March 1962 plenum repeated the warnings that pilfering state and social property represents one of the most dangerous forms of criminal activity in the socialist order of things. The Supreme Court of the USSR again called upon the lower courts to apply criminal law with the fullest severity and impressed upon them that the eradication of economic crimes is the most important task in the country for judicial agencies.¹⁵ The October 1963 session of the Supreme Court was devoted to the educational aspects of the trials and prosecutions.¹⁶

Similar urgings came from the Prosecutor-General of the Soviet Union, from the Minister of Justice of the RSFSR and from the legal experts in the Central Committee of the Communist Party of the Soviet Union.¹⁷

The preparation and conduct of trials for economic crimes also present several points of interest. Not only currency speculators, but also some major embezzlers of government property were brought to justice, not by the militia, but by the security police (KGB), which is an organ of the central government.¹⁸ This evidence of the interest of the central authorities in the prosecution of economic crimes is further strengthened by the fact that in a number of cases original jurisdiction was assumed by the Supreme Courts of the Republics where the crime was committed, a procedure reserved for cases of especial importance. Frequently a collegium of such a Supreme Court tried the case, holding a special session in a provincial town for this purpose.

In the Frunze case the *Supreme Court of the USSR* tried the case on the spot, a procedure reserved only for exceptional cases, and rather infrequently resorted to. It usually indicates important security considerations. In the recent past the USSR Supreme Court followed this procedure in two famous trials, that of Beria, which was secret, and the Powers trial (the U2 affair).

In some cases tried by the collegia of the Supreme Courts of the Republics, appeals to the presidia of the court were allowed,

¹⁵ Ruling of the Supreme Court of March 31, 1962, in *Sotsialisticheskaya Zakonnost*, No. 5, 1962.

¹⁶ *Sovetskaya Rossia*, October 30, 1963.

¹⁷ Cf., Introduction, *supra*.

¹⁸ By the Decree of June 27, 1961.

whilst in some others the initial sentence was declared final, and the sentences were carried out immediately. In some cases appeals were lodged and the cases were reviewed, and the original sentences were upheld. The press reports invariably state that the work of the security police, of the prosecuting authorities and of the courts was closely followed by the public, which followed the proceedings with an approving eye. Frequently, the court sessions were attended by delegations of the social organizations, which under the recommendations of the Supreme Court of October 1963 should become a standard procedure. In each case the public present in the court expressed satisfaction with the punishments meted out to the criminals, in particular, when the court imposed death sentences.

4. Economic Crimes – Reported Cases

(i) Rokotov, Faibishenko and Edlis

The first major case that came within the application of the exceptional decrees was reported in the Moscow *Pravda* of June 16, 1961. It concerned a number of people, of whom J. T. Rokotov, V. P. Faibishenko and Edlis were mentioned by name. According to the indictment the defendants had in “a relatively short time bought and resold foreign currency and gold coins of a total value of more than 20 million rubles (old currency)”. The criminal activity of the defendants had been a source of unearned income for a considerable group of people and had furthered the illegal export of Soviet money and foreign currencies abroad and the development of smuggling and speculation in goods.

The hearings established that the defendants:

Refused to work honestly in the interests of society, had pursued a parasitic way of life and, through currency speculation, had extracted an unearned income and enriched themselves. The defendants Rokotov, Faibishenko, Edlis and others, for purposes of buying currency and goods, had systematically met with citizens from capitalist countries who smuggled these valuables into our country and then had resold them at speculative prices. By engaging in such criminal dealings, they had debased the dignity of the Soviet man. All the defendants on trial had fully admitted their guilt and gave extensive evidence on their criminal activity and about their accomplices in the currency speculation.

The defendants were sentenced to various terms of imprisonment and, as *Pravda* assured its readers, the decision of the court “met with the unanimous approval of all persons present in the courtroom”. The defendants were brought to justice by the security police (Committee for State Security) and were charged and sentenced under the Decree of March 1961, which provided higher penalties for “violating the regulations on currency operations and for speculation in currency”.

The higher authorities, however, were not satisfied with the outcome of the trial. The USSR Prosecutor-General appealed against the sentence of the Moscow City Court, which imposed upon Rokotov and Faibishenko the maximum penalty which the law in force provided, fifteen years of deprivation of freedom. The case went to the Supreme Court of the RSFSR, which tried the defendants under the new charge that they "regularly and for profit bought large amounts of foreign currency and gold coins and sold them at speculative prices". In the meantime Article 25 of the Law on Crimes Against the State was changed; this dealt with violations of the regulations on foreign currency operations, and now permitted the imposition of the death penalty (Decree of July 1, 1961). The RSFSR Supreme Court, having reviewed the case on appeal, sentenced Rokotov and Faibishenko to death by shooting.¹⁹

The Court established that the volume of financial operations handled by Rokotov amounted to twelve million old rubles, and those credited to Faibishenko to one million. Again the public put the stamp of its approval on the proceedings and the sentence.

The Rokotov and Faibishenko case raises several important legal questions. In the first place there is the question of the law under which they were tried. It may be assumed that many of the activities with which the defendants were charged took place under the Law on Crimes Against the State of December 25, 1958, and most of it, if not all, prior to the first amendment of Article 25 of that Law by the Decree of March 1961, as the first trial took place on June 16, 1961. If that was so, then already the first sentence of the Moscow City Court imposing fifteen years deprivation of freedom was contrary to Article 6 of the General Principles of Criminal Legislation of the USSR and of the Union Republics, which was incorporated in the Criminal Code of the RSFSR of 1960, and lays down that:

Whether an act is criminal and punishable is determined by the law in force at the time of its commission. . . A law which makes an action punishable or increases the penalty has no retroactive force.

This provision was introduced as a result of the reform initiated in December 1958, and the language of Article 6 suggests that Soviet legislators were highly concerned that this fundamental principle of orderly penal policy should be firmly entrenched in the legal system of the Soviet Union. Neither the Principles nor the Code of 1960 permitted exceptions from the non-retroactivity rule, not even by adding a qualifying clause, such as, e.g., "unless expressly provided for by the law".

A fortiori, the appeal of the Prosecutor-General of the USSR against the decision of the Moscow Supreme Court, seeking a higher

¹⁹ *Pravda*, July 21, 1963.

penalty, was contrary to the law in force. The Moscow City Court had already exceeded its sentencing powers; further, the appeal was fundamentally illegal, and should have been thrown out of court. Nevertheless, the USSR Supreme Court reviewed the case and applied the Decree, which was enacted well after the first trial was held, and which by no stretch of the imagination could pertain to criminal acts committed before that date. There is good reason to think that there was a return to the practice of secret decrees in this case.²⁰

The manner in which the Prosecutor-General, the Moscow City Court, and the USSR Supreme Court handled the case made nonsense of the guarantees of legality enacted in the General Principles of Criminal Legislation of December 25, 1958, and it would appear that the decrees of the 1961-62 period have undone the reforms of the post-Stalin period. The handling of the case by the Soviet judicial and prosecuting authorities suggests that formal guarantees of legality have little if any currency, and the courts will not be constrained by formal requirements of justice.

(ii) The Frunze Affair

Izvestia of July 22, 1962, carried the news of sentences passed by the judicial collegium of the USSR Supreme Court, which held a circuit session in Frunze, Kirghizia, to try a criminal case under the special Decree. The case concerned a ring of embezzlers of state and public property, in certain knitwear and weaving factories controlled by the Ministry of Local Industry in the Kirghiz Republic. According to the brief summary of the case, the court established that for a number of years the defendants had been engaged in the theft of state and public property in especially large quantities, manufacturing unreported goods with raw materials obtained by bribery. The unreported goods were marketed through officials in the trade network who were in collusion with the original ring of manufacturers. Some money made in this manner was turned over to the confederates of the "criminal gang" in the Ministry of Local Economy of Kirghizia and in certain other Ministries and government departments of that Republic. These officials, in return for bribes, supplied the embezzlers with scarce raw materials and, by

²⁰ Harold J. Berman, "The Dilemma of Soviet Law Reform," *Harvard Law Review*, Vol. 76, No. 5 (March 1963), p. 929, pp. 948-949: "In a case tried in July 1961, one of the statutes imposing the death penalty was applied retroactively by a special edict of the Presidium of the Supreme Soviet authorizing the retroactive application "as an exception" in the specific case. (The edict was never published as it was not considered to be of general significance. I was shown it, however, by a member of the USSR Supreme Court. There is reason to believe that there were other such cases of retroactive application of the death sentence specially authorized by similar edicts)."

preventing a proper check on their activities, shielded them from detection. As a result of the trial, runs the report of *Izvestia*, death sentences were passed on four accused, and the rest were sentenced to various terms of imprisonment.

On a closer look, however, it appears that *Izvestia's* reticence covered up a great scandal in the economic administration of one of the Soviet Republics. Whilst the July report on the sentence of the Frunze trial would imply that this was a case concerning a limited number of persons, in fact this was one of the major affairs involving all kinds of illicit deals and machinations, in which important dignitaries of the administrative set-up of the Kirghiz Republic were implicated. The circle of persons included the Director of the Economic Plan, a deputy Minister of Commerce of the Kirghiz Republic and a number of other officials running a system of hidden enterprises for their own benefit. The original number of defendants mentioned in the first report of *Izvestia* (November 11, 1961), which was also short and lacked detail, gave the figure of persons implicated in the case as high as fifty-four.

A far more detailed account of the final day in court, printed in *Sovetskaya Kirghizia* of July 24, 1962, gave a different figure of death and prison sentences, although again the details of the court's decision are missing. The Supreme Court, stated the report, "sentenced D. T. Talasbayev, L. Ya. Feldscher, I. Ya. Tikhostup, M. Kh. Goldman, B. D. Dyushaliev, D. I. Bakuta, I. M. Dvorkin, A. M. Aspis, I. A. Akhun and others to death with confiscation of property . . . The following were sentenced to fifteen years' imprisonment with confiscation of property: S. M. Goloborodko, G. M. Khoimuratov, S. M. Farlandskii, V. B. Karasev, Ya. M. Smolkin, Ye. S. Zelenaya, A. Kh. Grinberg (alias Pramberg), I. P. Naradnicheskii and others . . ."

In spite of the uncertainties regarding the names and the number of defendants and their sentences, the Frunze affair is one of the better documented trials concerning economic crimes in the Soviet Union. In addition to two short reports in *Izvestia*, *Sovetskaya Kirghizia* carried five long articles containing an analysis of the abuses and the *modus operandi* of the private entrepreneurs ensconced in governmental industries in the Kirghiz Republic.

The beginning of the affair had been connected with the arrival in Frunze of two shabbily dressed men by the name of Gasenfrants and Appelbaum, both from Chernovits, who contacted M. Kh. Goldman in Frunze with a proposal to organize a lace factory to be operated on their private account. Acting on their instructions and with the help of their funds, Goldman then proceeded to bribe the head of the local district industry, and with his co-operation set up a small lace factory. It made lace and sold it to the public through the State distribution network, and prospered, until the

day when a state factory began to produce lace. The enterprise folded up, but it was replaced by a new enterprise, a rayon shop making knitted goods. The machines and raw materials were obtained from willing co-operators in the economic administration of the Republic, including even the highest authorities in economic planning. The list of people and personalities bribed by the organizers of the private enterprise was indeed impressive.

Whereas in order of importance the official heads of departments of the planning authority, heads of the supply services and directors of factories deserved most attention, the press reports insisted on drawing the public's attention to the operators on the shop level, who were engaged in the manufacture of the goods without proper authorization, and in their disposal through trade channels. Thus, *Sovetskaya Kirghizia* of Januari 9, 1962, explains the affair in the following words:

The whole thing started when M. Goldman, Natanson, Singer and others established a ring of embezzlers of state and public property, first at the former Frunze City Manufactured Goods Combine, which was later reorganized as the Alamedinsk Knitwear and Weaving Factory. At the end of 1955, upon the initiative of Feldscher, Stramwasser, Katz and others, a similar ring of embezzlers appeared at the Miscellaneous Manufactured Goods Cooperative, which was later reorganized as the 42nd Anniversary of October Factory; subsequently M. Goldman, Singer, Feldscher, Stramwasser, Katz and others entered into a compact, and this is how large gangs of embezzlers sprouted at these factories and operated for a number of years.

The materials of the investigation show that this was embezzling organized to the ultimate degree. The embezzlers' gang was composed of several groups. Their duties included obtaining and buying equipment and raw and other materials, marketing finished goods, bribing officials to obtain their help in securing scarce raw materials and equipment and marketing finished goods, etc. Feldscher headed one of these groups at the 42nd Anniversary of October Plant and Talasbayev headed the one at the Alamedinsk Factory. For example, Feldscher, Talasbayev, Goldman and Gerber established contacts with officials through whom raw materials and equipment could be obtained. Katz, Singer, Stramwasser and others recruited for the shops reliable persons to produce "un-reported" goods. Gasenfrants, Gerber, Stramwasser and others travelled from city to city and gave bribes to their spiritual brethren, who in return shipped raw materials and machine tools to Frunze.

As *Sovetskaya Kirghizia* of June 25, 1962, reported: Feldscher, M. Goldman, Talasbayev and their accomplices defrauded the government and plundered socialist property for a long time with impunity. With the aid of large bribes, they drew unstable, morally decadent people into their criminal orbit.

As the judicial process determined, one of the leaders of the plundering band, M. Goldman, who was chief of the knitted goods shop, had been stealing state property with his brother U. Goldman for a number of years. Goldman acquired low quality raw materials by illegal means and

sent them on to be manufactured as finished goods. High quality raw materials were used in the manufacture of goods of the so called "unaccounted" variety, which went for sale with the aid of commercial workers Natanson, Taubas, Zelenaza, Alterman and Aspis. The proceeds from these sales were appropriated by Goldman and his accomplices. In the Rayon Commercial Combine . . . bookkeeping and security were paralyzed because of the fraud and misappropriation. . . So, step by step, the mass of monstrous crimes is being investigated. Goldman, Gasenfrants, Talasbayev, Gerber, Natanson, Dyushaliev, Aspis, Farlandskii and others have stolen more than thirty million rubles in government funds. . .

The Frunze trial is easily one of the most important events in the long chain of trials for economic crimes since the exceptional decrees went into effect. It involved a great number of defendants but the exact number is not known for certain. It represented a combination of charges, relating to facts dating back to at least 1955, and they involved important personalities in the economic administration of one of the Soviet republics. The charges included most grave crimes in the Soviet system. The defendants were accused of having set up a vast industrial and commercial empire thriving within the socialist mechanism of the economy, and exploiting its channels, its institutions and personnel. The defendants were able to neutralize for a number of years the systems of industrial and financial control in order to screen their activities. So important were the operations of the ring that they affected the economic plans, both of the factory in which their industries were located, and the plan of the Kirghiz Republic. The very technique of operating the private system of economy within the system of socialist industries is truly amazing. They were able to switch from production of lace to production of rayon goods, from one factory to another, expeditiously and with great ease, obtaining from the factories and stores of the Republic machinery, raw materials and technicians, and making proper bookkeeping arrangements. Furthermore, the defendants were accused of giving or accepting huge bribes, although the press reports suggest that the entrepreneurs were paying regular salaries to high members of the economic administration, who were watching over the interests and the operation of the private industrial establishment.

Most significantly, however, although the Frunze trial was the object of a considerable number of articles in *Izvestia* and *Sovetskaya Kirghizia* (seven altogether), certain facts and details were never made clear. So for instance, the full number of defendants is never consistently given. In fact three different totals are provided. The first report in *Izvestia*, November 11, 1961, stated that "54 men will sit in the dock". The next article - *Sovetskaya Kirghizia*, January, 9, 1962 - actually lists the names of 46 indicted individuals, adding that unnamed "others" were also charged. And

on March 25, 1962, the same paper lists only 44 people "and others" who have been brought to criminal prosecution.

Another strange fact of the case involves one A. Kh. Greenberg (alias Pramberg). He is mentioned for the first time in the press record - in *Sovetskaya Kirghizia*, January 9, 1962 - though he is not included in the list of the indicted. He was accused there of abusing his position, but the nature of his position is never made clear, nor is his alleged abuse specified. Thenceforth, his name disappears from the succeeding press reports, only to reappear in the last one, in *Sovetskaya Kirghizia* of July 24, 1962 - where he is among those sentenced to 15 years' imprisonment and confiscation of property.

The reports of these sentences are strangely lacking in completeness. *Sovetskaya Kirghizia* of July 24, 1962, named nine persons as sentenced to death and to confiscation of property. But it adds that unnamed "others" received the same sentence. It also listed eight other defendants and also "others", as sentenced to fifteen years deprivation of liberty and to confiscation of property, whilst the remaining unnamed defendants were sentenced to varying terms of imprisonment, with confiscation of property.

The political and social significance of the trial is a matter of speculation. That it had a broader than local significance and that a matter of national policy was involved is suggested by the fact that the Supreme Court of Kirghizia was by-passed, and that jurisdiction was assumed by the Supreme Court of the USSR, which held a local session in Frunze. In addition this arrangement enabled evidence and material which was detrimental to these higher interests to be withheld from local information media, and what was more important, from local gossip, as the investigation was handled by the security police, and the prosecution by the office of the Prosecutor-General of the USSR.

The way of handling the Frunze affair seems to be linked with the local situation in Kirghizia, and the role of the economic administration in this Republic. Kirghizia is a non-Russian Republic, and, moreover, one which at the inception of the industrialization policies under Stalin was in an economically primitive stage. Both the programme of industrialization and the programme of collectivization had to be the work of an administration which consisted mainly of personnel from elsewhere. One of the characteristic features of the Frunze affair is the scarcity of local names in the lists of the defendants. As Kirghizia offered little opportunity for advancement, or for civilized existence, the members of the administration included a high proportion of representatives of minor Soviet nationalities, people without influence, including also those who had come into conflict with the authorities and been sent to Kirghizia for their sins.

This administration, while performing extremely important

work, remained aloof from the local population and in all probability was viewed with the regional mistrust that is common in many lands. The findings of the trial show that power was abused for private gain. In this administration, as well as in the local party organizations, the top positions were reserved to the Russian members of the hierarchy, who were bound not only by their common national loyalty, but also by the hostility of the surrounding world. It controlled all aspects of local life, and it is quite unthinkable that an operation of the Frunze type could have been even started without the co-operation, possibly even the initiative, of the highest members of the administration, who were invariably Russian members of the bureaucracy.

(iii) The Case of Shakerman, Roifman and Associates

Izvestia, the central newspaper of the USSR Government, announced on October 20, 1963, the arrest and impending trial of members of a widely organized network on charges of economic crimes. The operation had turned the rehabilitation workshop of a mental asylum in Moscow into a knitwear factory, and had grown to considerable dimensions: trade relations were established with 52 factories, *kolkhozes*, artisanal co-operatives, shops and shop-windows installed at several places, including the busiest Moscow railway station. 58 machines were employed, and 460 tons of wool were bought and made into fashionable knitwear. Bribed men in the supervisory trade organizations shut their eyes and the business flourished for years, netting – outside the official plans of the national economy – 30 million old rubles before the KGB (Committee for State Security) discovered it. The dealings were described by *Izvestia* as a “dreadful, heinous crime against the Soviet State, against every Soviet citizen”. The ringleader was identified as Shakerman, his principal aid as Roifman. It was on this occasion that *Izvestia* added: “We mention the Jewish surnames because we pay no heed to the malicious slander that is stirred up from time to time in the Western press. It is not Jews, Russians, Tartars or Ukrainians who will stand trial – criminals will stand trial.” Finally the newspaper asked for an exemplary, widely publicized public trial with the Procurator-General of the USSR leading the prosecution.

The public show-trial did not take place. The Soviet press kept silent on the case after the article quoted above. Instead, it was Western news agencies that reported death sentences. In January 1964, there were a few lines that the trial was going on, on February 11, on the death sentence meted out to Shakerman, on February 27, nine death sentences for other accused (out of them six are supposed to be Jews). Four other defendants were given 15 years

imprisonment each, and ten others lesser, undisclosed sentences, in the mass trial which in importance comes near to similar trials in Uzbekistan and Kirghizia. The trial is believed to have lasted for two months. The absence of publicity may be due to the involvement of important officials of the economic administration of the State and the Party.

Trud, in its edition of February 27, 1964, confirmed that there had been several death sentences but did not give the number. *The New York Times* of February 27 and news agency despatches placed this number at nine. According to *The New York Times*, 18 of the gang of 23 were Jewish.

(iv) The Kolkhoz Rossia Case – the Problem of Decentralization

There was in the Frunze affair another aspect of key significance which further complicated the issue. According to the press reports the beginnings of the Frunze affair may be traced back to 1955. It was approximately at that time, that the initial contacts between the members of the economic conspiracy were made. This was also the year when Khrushchev's plans for the economic reorganization of the national economy of the Soviet Union were taking place. Its final shape was given by the Law of May 1957, which established the *Sovnarkhozy* (Economic Councils). Under this law, only general planning powers were retained by the centre. All important powers were delegated to the Councils, including the initiative in developing local natural resources, the monopoly of financial and material control, and a good deal of control as to investment locally available. The most important aspect of the control was that there were no longer national industrial branch administrations, able and competent to check and examine the activities of the individual enterprises in the minutest detail in the remote spots of the Soviet Union.

The relaxation of controls, with decentralization and emphasis on regional administration of the national resources was a critical experience for the Soviet Union. The idea behind the reform was sound; a certain period in the economic development of the country having come to an end, a new principle must replace that of extreme centralization if the Soviet economy was to make progress. At the same time, not all branches of industrial activity were ready for the reform. Owing to the emphasis on the development of capital and investment goods, consumer commodities were in short supply, which presented serious dangers for the success of the reforms. Already in 1958 at the highest levels of the Party complaints were voiced about "localisms" demonstrated by the regional economic administrations, and a reverse trend to increase the powers of control from the centre over local economic activities began to gain

strength. It soon became apparent that the reform as it was conceived and executed, not taking account of local conditions, had failed.

There were numerous reasons for the dissatisfaction with the reform and it is outside the scope of the present study to give a full analysis of the situation. It is essential, however, for an understanding of the penal policies at present enforced in the Soviet Union to outline some of the more fundamental failures in the reorganization plan. In the first place the call for decentralization was understood as freedom to exploit market opportunities. Local and regional economic planners, who could not be aware of the needs of the entire country, saw the new opportunities in terms of local economic expansion. Hence a tendency to serve the nearest markets, or to serve the markets which offered the surest and the greatest profits, which caused the early complaints against "local tendencies". A case study of the trends which developed as the result of decentralization is the case of the *Kolkhoz* Rossia in Moldavia (*Sovetskaya Moldavia*, February 2, 1961).

In search of an opportunity to increase the capital and the wealth of the *kolkhoz* and the income of its members, the managers began to use illegal middlemen to transport its products to the far north, where they commanded high prices. In this manner they performed useful services both for the *kolkhoz* and their members and the far north, which was supplied with goods otherwise in short supply. So far, so good. But the next step was already a capitalist transgression. The *kolkhoz* managers began to buy up local produce and transformed their enterprise into a trading organization. In order to cover up this activity, which was itself illegal, they began to falsify their accounts, and stopped depositing their gains in the State bank.

Although this operation was criminal in the Soviet system, in terms of the techniques of free economies it was a sensible business procedure, devoid, at least, of corrupt intentions and cupidity. In somewhat different circumstances the decentralization reform was a godsent opportunity for corrupt officials to enrich themselves at the expense of the government and public enterprises. The crimes of the officials in the economic administrations of various Republics thus created a delicate situation, of which the Frunze affair may be a representative example. The affair demonstrated a widespread corruption in the economic administration of the Soviet Republics. In Kirghizia and in other Soviet Republics, this administration was the product of the centralized controls, and was a foreign body in the system of local governments, at whatever level of public authority.

The matter was complicated by the fact that, at the moment of the trial the regime was, as regards the decentralization policy, in retreat. To succeed in establishing the new system of controls it

could neither dispense with centralized economic administration, nor with the services of Russian personnel. Confronted with cases of the Frunze type, the courts stressed the role of the lower levels of economic administration rather than the abuses and corruption of the highest officials who were the main offenders. The scapegoats were found in the persons in various subordinate positions, an easy target for a charge of corruption, diverting public attention more successfully from the central personalities in what was a complex situation fraught with danger for the policies of the Soviet government.

Finally, it is necessary to mention, the authority and prestige of N. S. Krushchev himself was also involved. He was the author of the reform, and of the liberalizing trend in the economic reorganization of the country, a policy chiefly responsible for the affairs of the Frunze type. If the full ramifications of the affair were made public, the efforts of the Party, again identified with the person of Krushchev, would be jeopardized, and instead a postulate to reform the economic administration itself by getting rid of the imported element in local economic administration could gain strength.

(v) Cases in Tashkent

The pattern of the Frunze affair is repeated in the whole series of the similar affairs analyzed and discussed in the court proceedings in the various corners of the Soviet Union.

Tashkentskaya Pravda of July 25, 1962, reported a trial which was a modest version of the Frunze affair, with the same reporting technique as in that case. It was a case of private enterprise, a weaving factory run in a furniture factory. There were twenty-one defendants. However, only eight names were mentioned, although by the very scope of the operation, which involved the setting up of a shop, assuring the supply of yarn, and the co-operation of the distributing channels, would suggest that this enterprise required the co-operation of a considerable number of people in the higher echelons of the economic administration.

The report of *Tashkentskaya Pravda* thus described the operation.

... a fringe manufacturing shop was set up in the factory. The new shop was equipped with wooden weaving-looms and personnel were assigned. The necessary raw material, viscose, was obtained ... by bribing employees of the Barnaulsky synthetic yarn factory and of many other enterprises. However, only a small portion of the viscose was delivered directly. The majority was resold at inflated prices to similar shady operators. In order to cover up the thefts, wide-scale write-offs of viscose and cord were practised, claiming spoilage of large amounts, and the raw materials written off in this manner were "transferred" to the manufacturing combine No. 2 of the Uzbek Society of the Blind.

The general impression of this affair is that in some respects it was a question even more important than the Frunze conspiracy, as its ramifications seem to involve a number of other similar schemes to organize private enterprises. And again, as in the Frunze affair, only four defendants were mentioned by name as sentenced, whilst the rest were included in an enigmatic sentence that "the remaining persons indicted in the case were also sentenced to lengthy terms in prison".

Neue Zürcher Zeitung of October 10, 1963, reported that eleven death sentences were imposed on the defendants who had operated a textile factory in Tashkent, described in *Pravda Vostoka*. According to this report, a silk factory was partially run for the benefit of a group of private entrepreneurs. They had illegally produced some 310,000 metres of silk cloth, which was sold, netting the gang a profit close to a million rubles. Another gang conducted similar operations from a Tashkent textile factory. It was apparently a major operation involving sale and purchase of factory equipment, raw materials, and production of cloth for private account, using government machinery and government raw materials.

(vi) The "Ausma" Case in Riga

Another important instance of the danger of a revival of private enterprise is the case of the underground lipstick factory. It was set up by Nikolai Kotlyar and D. Begelman, both with previous convictions for economic offences. Their crime consisted of exploiting the apparently unsatisfied demand of Russian women for cosmetics. According to the report, Kotlyar "installed in the basement of his home three casting apparatuses for the bottling of the lipstick mass - exactly like those at the "Ausma" Riga plant - laid out electricity, gas and water... Also engaged in the preparation of the lipstick mass, together with the owner, were his wife, Dora Efimovna, his daughter Mary - a second year student at the Moscow economic-engineering Institute, and his nephew, Efim Kryzhapolsky - a dental technician in the dispensary of the Moscow Sovkhoz "Kommunarka".

The business was organised on a large scale. With the assistance of "criminals" working at the Riga "Ausma" factory, Kotlyar turned the latter into a branch of his illegal plant in Ostankina. From Riga this illegal scheme received the formulas, tubes and equipment, then dispatched his output to all corners of the country. According to the facts unearthed by the investigation, Kotlyar had, in 1960 alone, received 59,000 tubes from the Riga factory, which were delivered to Moscow by train and in his own Volga car by Kh. Norman.

... The illegal dealers' accomplices in Riga - I. Kogan, P. Alte, E.

Zakhodin, B. Motylev, S. Churkin and others – looked upon the “Ausma” plant as their own private domain. They set their own rates for the factory’s chief workers. M. Goliashov, the manager, thus received, in addition to his salary, 1500 rubles monthly; Dzhakover, the chief engineer – 1000 rubles; Rier and Sher, the accountants of the plastic department – 200 rubles each. A wide network of homeworkers, producing tubes for the illegal factory in Moscow was also established.

Again, the press reports have placed the whole affair out of focus. The report of the trial and of the sentences drew public attention to the secondary figures in the whole affair. Kotlyar and his associate Begelman, whose role was never fully explained, received death sentences, whilst five “others” were sentenced to various terms of imprisonment.

(vii) Embezzlement and theft of Government Property

The next group of trials and cases reported in the Soviet press deals with that type of economic crime which consists of abuse of the position of trust, and procuring for oneself or one’s family material benefit at government expense. This type of crime is committed by embezzlement and theft of government property or services or by exploiting subordinate personnel.

The trial of six Jewish defendants in Khmelnytskyi in Ukraine (Poisner, Kuris, Goldenfarb, Schneider, Katz and Greenberg) deals with various people in various minor governmental jobs, who had dealings with a currency operator, Kuris, who occasionally sold them gold coins. The report is quite unclear on the positions in which the defendants worked, and the amount of government property embezzled or stolen. The guilt of the defendants is established by the mere fact that they had gold coins in their possession. With the exception of the defendant Poisner, from whom a sizeable amount of gold was confiscated, the hoards of other defendants seem to be rather insignificant. Again, the defendants were protected by members of their families who shielded their activities and hid their illegal wealth (*Pravda Ukrainy*, August 1, 1962).

The abuses of Dr. S. Grossman, the chief physician of the Sernovodsk-Kavkazsky resort, was the subject of two reports in *Sovetskaya Rossia* of August 11, and September 21, 1962. It was alleged that Dr. Grossman abused his official position to build himself two houses on government land, using government transport and labour paid from government funds. When his manipulations were discovered he was expelled from the Party and demoted, but his services as a resort doctor were retained. Whilst public censure affected his position, his property was not confiscated and, apparently to gain public favour, he offered one of his houses to the Municipal Executive Committee.

One of the early cases of straightforward theft was reported

by *Izvestia* (May 13, 1961). Mikhail Isakovich Maly was a goods examiner in a governmental mill in Mineralnye Vody. In this capacity he had access to the flour stored at the mill which he sold to other members of the gang, which otherwise consisted of non-Jewish members, including a flour speculator, Volkov. The chief evidence of his malpractices was the fact that Maly owned a house in Krasnodar where the authorities were able to discover great riches.

The grain needed for the operations of the gang came from various bookkeeping operations. A check in one of the government stores which was under the care of one of the accomplices revealed "a surplus of 2,300 tons of grain . . . It was created upon receipt of grain from *kolkhozes* and *sovkhoses* by moisture increases, . . ." and other bookkeeping operations. It is not made clear what was the role of the various defendants, or their share in the criminal transactions. There is mystery as to where the stolen flour was sold. The person of Volkov, the flour speculator to whom the flour was supplied, remains shrouded in mystery. Was he one of the middlemen, so widely used in order to obtain the co-operation of partners in the trade, who would not be budged by official instructions? Although Maly figures prominently in the case it is never explained why he was deemed deserving of the death penalty, while other members of the gang escaped with prison sentences.

In December 1962 there was a mass trial in Kiev of various officials charged with fraud and embezzlement of government property. They were employed by the fruit and vegetable trust. Their *modus operandi* was to grade the produce delivered to the pickling plant of the trust and to its warehouses lower than its real quality, and then to pocket the difference in price obtained from the consumers and the amount paid to the producers. The six Jews who were listed as main defendants (Rabinovich, Sheinkin, Bronfain, Issagor, Shknevsky and Egilsky) were warehouse workers, and commodity experts, and although they lacked professional qualifications, they issued papers, attestations and other documents concerning the quality of fruit delivered. There was no allegation that the six men, who received the harshest penalties of the whole lot, participated in the other aspects of the fraudulent operations.

Another case concerns the person of Lev Semyonovich Friedman. A long report of his misdeeds contained in the *Sovetskaya Byelorussia* of September 28, 1962, seems to base its allegations of Friedman's crimes on the fact that, although drawing at most an income of 84 rubles a month in the form of wages in addition to 41 rubles pension, he was able to build himself a six-roomed house. This fact alone should have been enough to initiate the proceedings against him, although there was no proof whatsoever of misappropriation in office or illicit dealings. That Friedman's "foul

deeds" had until then remained undetected was the fault of various persons in official positions, who demonstrated complacency and lack of proper vigilance. The very fact that he sold a part of the house to his sister with whom he lived, should have given rise to an investigation. The fact that on two previous occasions, acting on information received, the prosecution authorities failed to institute proceedings against Friedman does not indicate that the authorities were satisfied that there was no ground for prosecution, and that Friedman is innocent, but that the authorities were lax.

5. Press Propaganda on Reported Trials

As has been observed above, the Press has a most important function to fulfil in what it reports (and does not report) on criminal trials. The aspects which are brought out in what to Western eyes appears a strangely unbalanced selection of the important features of a case represent the view of the case which the public are supposed to form. But the task of the press goes far beyond the selection of the appropriate factual material: there is a didactic task to perform.

And so one reads high-toned censure, sometimes to the point of invective, against the criminals in the dock. The reporter may go further and diagnose the moral malady which has led them there, with a warning, express or implied, to others; such warnings are greatly reinforced by the sentences pronounced on the miscreants.

The reports already described in this study show an extreme reticence in identifying all the defendants. The analysis of the ill that afflicts these criminals is a delicate propaganda task, since the very heart of Marxist philosophy on economic greed is being chafed. The image, both physical and psychological, which emerges is beyond doubt a co-ordinated image. It is deserving of close and careful study, as either the true villain or the scapegoat in the moral ills besetting Soviet society. Reports which are especially revealing will now be considered.

(i) Kishinev

Sovetskaya Moldavia of July 8, 1962 covered the activities of a group of currency dealers tried in Kishinev, including Walter Bronstein, Frieda Holzman, Usher Reznik, Semen Kroprov and Fishel Kleinman. The report opened with a description of one of the defendants. He gave the impression of being an unfortunate creature, who could never make ends meet. Standing behind the china department counter of No. 15 store of the Kishinev Municipal Commercial Administration, he was usually seen unshaven, sloppily and poorly dressed. He worked without a smock. All the salesmen had

sewn smocks for themselves, but he refrained from that, saying: "I have no money for such luxuries." (*Sovetskaya Moldavia*, July 8, 1962).

The report of the trial of a group of currency dealers in Odessa (*Radyanska Ukraina*, July 13, 1962) starts with the following statement:

They settle only in those places, where they can profit and gain a few things. As a rule they lead a double life. They occupy low-paid positions or they do not work at all, but all this time they lack absolutely nothing.

Benjamin Gulko used to come to the market in Odessa "in shabby, pitiful and humble clothing. Near the lunch counter, he mingled with the pushing crowds, swallowed several *piroshki* and then vehemently insisted that he had eaten not four, but three. He constantly attempted to sneak free rides on trams and trolley buses. Strong and healthy . . . he had not worked anywhere for a long time, complaining of his illnesses. All the time his wife, Betya Rotstein, worked as a bookkeeper . . . receiving no more than 60 rubles per month."

"A similar modest way of life was led by still another couple, Foka Fuchs and Zipa Lapidus . . . However, they lived quite differently in the dark recesses of their secret life."

The *modus operandi* of the foreign currency and gold coin dealers involved a good deal of travel. Gulko travelled through Siberian villages selling rakes and shovels manufactured from stolen metals. Later he began to deliver large quantities of manufactured goods and astrakhan fur accessories (in all probability old clothing, as it is not asserted that it was embezzled from government stores) from Moldavia to the Urals and Siberia. He frequented Chernovits, Lvov, Vilnius and Kishinev, where he bought and sold gold coins and American dollars. The same applied to other "compatriots" of Benjamin Aronovich, as the report describes the members of the gang.

On the fringes of this criminal circle is a whole group of persons, not directly implicated, but at the same time drawing profits from the criminal deeds of others. Some of these, it is said, lack even a primitive sense of decency and participate in the crime by helping the accused to escape retribution. All of them are the "compatriots" of the defendants. Here belong Burshtein, Zabludowska, Veiner. Among them is also L. Ambartsumian, whose name has an Armenian sound. However, the reporter reveals that Lyuba Ambartsumian's grandmother was Tender-Kogan, who had dealings with the chief defendant, Gulko, and that she lent her name for the deposit of various sums of money, profits from those illicit deals. The aggravating feature of this was that young Lyuba was a Kom-somol member and a university student (*Radyanska Ukraina*, June

13, 1962, *Literaturna Ukraina*, June 15, 1962). In spite of her youth, Komsomol membership and the benefits of higher education, she was unable to see the right side of the picture.

The reporter was prompted by this case to make the following philosophical observation: "Someone once said that the human soul was more complicated than atoms and molecules. In reality we live side by side with people who have been rewarded by the trust of the Homeland, who have been placed in important positions . . . They pay lip service in fervently approving the moral code of the builders of the new life, but in fact if it is profitable, these chameleons are prepared to allow their duty and honour to be carried away by the wind." And he proceeds to list those people who, like young Lyuba, lack proper moral sensitivity. In this category is the director of the No. 10 school of the city of Kishinev, D. Ya. Bekerman, who accepted 20,000 rubles for safe-keeping from his relative, currency speculator Fuchs, and his friends in various official positions. Money and valuables belonging to the currency speculators were also stored by H. Ye. Goreschnik, book-keeper at the Moldavian Petroleum Supply and Distribution Administration, and by G. A. Reznik, a teacher at the Kishinev No. 41 High School.

The story of the Chernovtsy trial in the Circuit session of the Ukrainian Supreme Court, reported by *Pravda Ukrainy* (October 9, and 21, 1962) is almost an exact replica of the two other cases. It involved fifteen defendants, of whom only some names are given. The criminal in chief, Alster Bronshtein, a man of 81, is also true to type. "He pretended poverty. He would go into cafeterias, look hastily about and eat the left-overs on tables, stuffing the pockets of his old coat, with its threadbare collar, with pieces of bread. He engaged in begging." Another speculator was Yefim Margoshes, whom the state had given a free education and a good profession. "But he did not have it in him to do honest work, and as a railway inspector used every opportunity to establish connections with the criminal underworld." Another who also shunned honest work was Moishe-Meyer Zayats. "The only thing he could do", the reporter assures his readers, "was speculation in everything from women's stockings to gold." Then came Hersh Sternberg and his wife, Srul Zimilevich, a supplies officer of the Ostritsy kolkhoz, Esther Vainberg, a defence lawyer at the city legal consultation office, and a great many others of lesser station in Soviet society and mentioned by name only: Isaak Ronis, Enzel Koifman, Samuil Leventhal, Mendel Flomenboim, Feliks Mester, Gersh Nagel, Leonid Sherman and Yankel Koyen . . . Six of the defendants, all Jews, were sentenced to death.

There was supposedly only one explanation for the greed and rapacity of the speculators, the workshop of gold. Those who

worked were able to earn enough for their needs. The State and society rewarded those who devoted their life to building a better future for the Soviet people.

The mentality of the speculators was (*sic*) incomprehensible to the average Soviet man. As the Ukrainian reporter tells his readers, a Jewish woman by the name of Mironer was apprehended, but released, as she had a little daughter, who would have been left without proper care if her mother had been jailed. It was a humane decision. And yet the reporter wondered whether it was a wise one. Mironer was so addicted to gold and wealth, that when she was freed she had no mind for her child, but continued to bewail the loss of her wealth (probably confiscated by the authorities) and the fact that her exposure left her without purpose in life. She threatened suicide.

Other cases reported in the Soviet press take the reader to Byelorussia, the third most populous of the Soviet republics, with a considerable Jewish settlement. The case of Bursak, covered by *Sovetskaya Byelorussia* (June 15 and 20, 1962), included some eighteen defendants ranging in age from twenty five to sixty. The *modus operandi* of the criminals resembles the pattern already reported in previous trials. Speculators were people who had the opportunity to travel. The principals in this case had connections in a number of major Soviet cities, again mostly in the newly acquired territories. The reporter stated that the defendants "had established a huge network including Minsk, Riga, Kishinev, Vilnyus, Kutaisi, Lvov, Leningrad, Tbilisi, Kiev, Slutsk, Chernovtsy, Brobruisk, Brest and other towns". The central person in the ring was a certain Khaim Khiger, an engineer, a man with a good profession, who remained hidden for a long time from the eyes of Soviet justice. Owing to his position of leadership he set himself in the position of a spiritual guide and an arbiter in the affairs of the speculators.

The case of the speculation ring which operated from the Moscow base attracted the special attention of the Soviet press. In addition to press reports in *Vechernaya Moskva* of June 2, 1962, and *Sovetskaya Russia* of June 6, 1962, *Komsomolskaya Pravda*, a paper of the Communist youth organizations, printed an important article discussing certain aspects of the affair. The speculators bought gold and currencies in places where they were cheaper and in greater supply, and sold them where they commanded higher prices. Travelling from one city to another was one of the important features of the currency operations. Simis, the young member of the gang, did most of the traveling. He drove a Pobeda car on trips from Moscow to Leningrad, and later flew to Leningrad, Tashkent and Riga on commissions from his bosses, transferring suitcases with gold, currencies and securities.

It is an incongruous company. As *Komsomolskaya Pravda* described the scene in court, "nine villainous old men are now sitting here in the dock, who before the revolution owned stalls and stores, bought up golden ten-ruble coins in the NEP period, speculated in flour and sugar during the war and plundered more than one *artel* in the post-war years. And next to them, as though a personified evidence of the tenacity of capitalist survivals, solemnly sits 27 years old Simis."

The person of Simis, his behaviour, and the attitude of his colleagues and friends in the scientific institute where the youngest member of the gang was an engineer, were discussed at length. Simis became entangled in the affairs of the speculators when still a student. In the beginning he ran errands for one of the members of the gang. Later he became a driver of a car belonging to one of them, which was registered in Simis's name, and finally began to travel by plane, transporting suitcases and briefcases with currency and gold, engaging also in deals on his own account. It can be easily imagined that this young engineer, a typical product of Soviet education, was an important asset in the operations of the gang. *Komsomolskaya Pravda* found it astonishing that Simis, both as a student and later as a well to do man with higher education who earned enough money, whose young wife earned money, should seek additional income. As a young student he was on the lookout for more money, doing menial jobs. As a young engineer with a government job, he wanted to have a motorcycle, then a car, and still later a *dacha*.

The reporter threw up his hands in despair on finding that Simis was not without proper ideological education. "Leninist Simis", he wrote, "did not lose countenance in taking up with this riff-raff. On the contrary, he began to envy and imitate them. Simis already owned a thousand-ruble business, but he wanted a million-ruble one . . ." But even more disturbing for the reporter and for the prosecuting authorities was the indifferent attitude of Simis' friends in the Institute. They wished to know how the workers of the Giprotsvetmet Institute automation department could have overlooked such a rascal.

At work, Simis was a painstaking, industrious engineer, who willingly fulfilled all the Komsomol instructions, unanimously declared his immediate superior, group leader Tamara Vasilyevna Korotchenko, engineers Evgenia Lvovna Rusina and Aleksander Aleksandrovich Taits, and technician Eduard Yuryevich Koort. "Walking through the court-room, Rusina and Koort gave a friendly smile to Simis, while Tamara Vasilyevna shook his hand warmly, just as though her former subordinate was sitting in the Presidium of a honorary meeting." The worst part of it was that the collective of which Simis was a member, and where he made friends, was

aware of the fact that Simis performed various services for some uncle of his, and that he was paid in return. His immediate supervisor, apparently deeming Simis to be an efficient worker, gave him leave from time to time to earn additional money. They all knew that Simis worked to save money, and to buy himself a car and build himself a *dacha*, and they thought nothing of it. In a sense, Simis's friends were responsible for his downfall:

"No, in vain do the friends of Simis seek to justify themselves here. This is an accusation both against Simis and those who considered themselves his friends. They saw that a well to do man walked around in tattered clothes, saved on food, books, movies, but, strange to say, the miser and skinflint, blinded by the lust for accumulation, who for the sake of money was ready for any degradation and any baseness, was considered in the collective as a reliable, decent and purposeful man. Nobody rebuffed the young money-grubber, nobody put him to shame. Car and *dacha* cannot be the aim in one's life. Stop skinflinting and being greedy. Do not doom your child to anemia. Eat, drink, live for your pleasure, invite your wife to the theatre, enjoy all the boons of life."

Simis, the correspondent thought, was "led astray by the very first fifty kopeck coin he decided to put in his money box, instead of spending it on icecream. The cult of property has killed in him all our light, good and Soviet. Now before us is a spiritual descendant of that black market dealer, who, exactly like a werewolf, has assumed the appearance of an engineer. Former Leninist Simis differs from those sentenced to death, NEP men Litvinovsky, Blazer, Khanin and Fuks, only in the lapse of forty years between the time he and they have added ruble to ruble and put these into circulation to obtain three."

There were other important cases involving Jewish defendants. The Trade Union paper *Trud* (November 25, 1962) reported a trial of "major currency speculators". As a result of this trial four people with Jewish names were sentenced to death and five others jailed for terms of six to twelve years, with confiscation of property, by the Moldavian Supreme Court in Kishinev. According to *Trud*, a sum of 600,000 rubles was involved. Those sentenced to death were Rubinovitch, Goldenstein, Polanker, and Tabak. A man named Serebnitsky received two years imprisonment. Uchitel and Milenshtein were given sentences of eight years and Sudman and Gorbaty of six years. About forty Jews appeared in the dock, but most of them were acquitted.

Another example of speculation was the case of Leiba Khaim Dynov, who specialized in real estate. He started on his career when he built a house in the Byelorussian city of Gomel, and sold it. After some time he bought another house, which he also sold for profit. Two more house transactions followed in a short time, this

time in Minsk. He found himself in jail, but was released when the psychiatrist's report confirmed his defence of mental illness. Once released from prison he continued his operations, and again built himself a large house (*Sovetskaya Byelorussia*, August 28, 1962).

6. Anti-Semitic Trends

a. Jewish Defendants

Apparently sensitive to the allegations made in the Western world *Izvestia* (October 20, 1963) denied energetically the suggestion that the trials for economic crimes revealed a campaign of anti-semitism. By the end of October 1963, another mass trial involving Jewish defendants was in preparation and was to be held in Moscow. In the long preliminary report which appeared in *Izvestia*, the allegation of anti-semitism was denied in the following passage:

We mention the Jewish names of people in this ring because we pay no heed to the malicious slander that is stirred up from time to time in the Western press. It is not Jews, Russians, Tartars or Ukrainians who will stand trial, criminals will stand trial. (Cf. 4, iii).

Obviously, the mention of a defendant's name, whether it reveals Jewish or any other affinity, is in no way improper, but if the reports of economic crimes are studied, it becomes immediately apparent that a disproportionate emphasis is placed on the nefarious activities of Jewish defendants. There are already traces of this in the cases covered in the preceding section of this study. Other cases will now be examined.

(i) The Frunze Affair

The account given above of the Frunze affair lists by name and gives a detailed account of the activities of mostly Jewish defendants with a very high proportion of the defendants remaining anonymous. Reasons for the reticence on the unnamed defendants have been suggested above. The question then rises why these particular names were singled out. *Sovetskaya Kirghizia* of June 27, 1962, went so far as to list the Jewish defendants as representatives of an alien world. The prominence given to the Jewish defendants clearly indicates an attempt to lay the main guilt at their door. In the Frunze affair, there were highly placed officials who supplied equipment, raw materials and machinery, issued permits, falsified production and distribution plans, supervised the accounts and frustrated financial scrutiny in the industries involved. For all this, the supposedly principal *dramatis personae* were in terms of their

official position merely small fry. Among the non-Jews one finds the Head of the Planning Department, the Director of the Trade Department of the Frunze City Manufactured Goods Trade Trust, the Deputy Minister of Trade, the Director of Administration of the Frunze Province Local Industry, the Director of the Moscow Division of the Kirghiz Chief Supply Administration, the Director of the Material and Technical Supply Administration of the Ministry of Local Industry, the Director of Industrial Administration of the same Ministry, the Director of the Planning and Economics Department of the Economic Council, the Director of the Industry Department of the Council of Ministers of the Republic, the Chairman of State Planning of the Republic and the Assistant Director for balances, material and technical supply of the State Planning Commission. It is remarkable that the public are given lurid details of the wealth accumulated by the Jewish defendants whilst that of the non-Jewish members of the gang is hardly mentioned. The indictment lists sums amounting to from 34,000 to 150,000 rubles as the share of the officials, but attention is drawn not so much to the riches accumulated by them as to the depredations of the Jewish defendants. Of the 47 actual names listed, 26 seem to be Jewish. The criminal propensity of the Jewish population of Kirghizia would appear to be disproportionately strong on the basis of Soviet press reports, since the Soviet census of 1959 found so few Jews in Kirghizia that they are not even listed among the national minorities for that Republic.

(ii) The Vilna Case

In February 1962 eight persons were tried for currency offences in Vilna. It was a case which attracted wide attention and was reported in three Moscow papers: *Pravda*, *Izvestia* and *Komsomolskaya Pravda*, all of February 11, 1962, and in *Sovetskaya Litva* of April 4, 1962. The names of the defendants were as follows: Fedor Kaminer, Mikhail Rabinovich, Aaron and Basia Reznicky, M. Melamed, R. Vidri, M. Kaminer, and Z. Zismanovich. The Jewish features of this case came out with special prominence in the press. All of the accused were described as having connections with gangs of Jewish speculators in other major cities. On several occasions the fact that Basia Reznicky had brothers in Israel and in the United States was mentioned. The accused had transacted their deals in the Vilna synagogue and the local rabbi arbitrated in cases of dispute. The overall characteristics of the defendants were, as *Pravda* put it, that "this people stood apart from our life. They were not interested in how the Soviet people live." The first four defendants were sentenced to death, Basia Reznicky having the unsought for distinction of being the first woman sentenced to death

since Stalin's time. Another case carrying the death sentence was that of a certain Biller (*Vechernaya Moskva*, February 16, 1962) for speculation in foreign currency and gold coins. Two Soviet scholars who travelled abroad were given a considerable amount of money for the defendant by his two sons in the United States.

b. Jewish Synagogues and Economic Crimes

The Soviet press campaign, which pointed the appropriate lessons from individual cases and instructed the public in the art of detecting economic transgressions against the Soviet polity, has dwelt on several occasions on the fact that Jewish synagogues in the Western provinces of the Soviet Union have served as the gathering-place for the speculators. In the Reznicky case the press reports stated that the rabbi of the Vilna synagogue had served as an arbiter in disputes between the currency dealers. Another charge brought against the religious leaders of the Jewish communities was that religious rites and Jewish holidays calling for the use of specially prepared food provided the synagogue leaders with an opportunity to extort exorbitant prices for food items prepared according to the canons of their faith.

Among such accusations revived in connection with the campaign against economic crimes, the case of the Great Synagogue in Lvov is perhaps the best illustration of the complex situation of the Jewish minority in the Soviet Union and its exposure to the dangers of social and economic tensions. The Lvov case puts the question of economic crimes into a different social and political setting. The charge of speculation was used to destroy a centre of Jewish life in Lvov, a centre which had a singular meaning. On November 5, 1962, the Great Synagogue of Lvov, the last remaining Jewish prayer house in Western Ukraine was shut down by the Soviet authorities. The closing of the synagogue was the culmination of an intensive propaganda campaign waged by the press, the courts, the Party, the security police and the militia.

For Jews Lvov has important historical connotations. A Jewish settlement dating back to the thirteenth century, when it was rebuilt from the ashes by the Polish Kings, it served for more than six centuries, with its multinational population (including in addition to Jews, Armenians, Tartars, Moldavians, Ukrainians and Poles, large settlements of Scots and Huguenots), as the antimurale of Western civilisation. Lvov, although coveted by Russia, remained outside the confines of the Russian Empire, and until World War II escaped Soviet domination. Not only were the Lvov Jews mostly former Polish citizens, attached to Jewish religion and culture but they were a branch of Western European cultural experience. In addition they have lived under Soviet rule for only 18, rather than 45 years.

And yet in spite of all these circumstances, which for the Soviet regime were full of ideological dangers, the existence of 30,000 Jews in Lvov was of no political consequence for the Soviet Union. The city's former inhabitants were either deported to Russia, decimated by the Germans, or evacuated to Poland after the Teheran Conference assigned the city to the Soviet Union. The remnants of the once numerous Jewish community were surrounded by new inhabitants. In the new social setting the spiritual comforts of religious practices were for the majority of the Lvov Jewry of singular significance.

The Lvov affair was the subject of an extensive press campaign. In the period from February 25, 1962, to November 1, 1962, seven articles attacking the Synagogue and its leaders appeared in *Lvovskaya Pravda*.

In addition, an important letter entitled "Letter from Lvov" was printed in *Voyovnichy Ateist*, a paper published in Kiev, which demanded that the Lvov Synagogue, exploited for anti-Soviet activity, be closed. The Synagogue was pictured as the centre for illicit currency dealings. Jewish speculators from Lvov and foreign towns met and carried on their trade and concluded their transactions. Not only was the Synagogue abused for such a purpose, but the Synagogue leadership consisted of speculators entrenched in important positions in its administration, including its highest body, the *dvatsatka*, the Council of Jewish elders. The leading figure in the Synagogue and in the ring speculators was, according to *Lvovskaya Pravda*, the ritual slaughterer Kontorovich, who made religion and its rites the source of his personal income. In contravention of the State wine monopoly he made religious wine, which he sold at exorbitant prices, for the celebration of religious festivals.

The misdeeds of Kontorovich and his accomplices family resulted in a trial, which was held in March 1962, and resulted in the death sentence for Kontorovich and Sapozhnikov, both members of the Synagogue's Council. They shared the dock with three other defendants, Chernobilsky, Sendersky and Cherkas, who had acted as their accountants, salesman and agents. The general purpose of the trial was to link the Synagogue and its leaders to the machinations and speculation with currency and gold which were the object of court proceedings in other Soviet cities. The activities of Benjamin Gulko, executed for currency transactions and trade operations in Odessa, were brought in evidence to seal the fate of the defendants. Although he was dead, his alleged depositions for his own trial were read as evidence in court.

"For several years", wrote *Lvovskaya Pravda* of March 9, 1962, "the accused had engaged in large speculative deals, purchasing and selling gold, foreign currency and jewels. Acquaintances and 'business relations' were established within the synagogue walls, the heads of which - members of the so-called *dvatsatka*

- were Sapozhnikov and Kontorovich."

A sort of "black market" was active in the synagogue. "This was where currency speculators from other towns gathered, among them the aforementioned Gulko, as well as Sh. Kuris and others. It is here that Kontorovich and Sapozhnikov transacted their deals. And here too came Sendersky, not to pray, but to receive orders from Kontorovich and subsequently to depart on regular trips for the purchase of foreign currency."

The second theme is that religious rites provide an opportunity to conduct trade with objects connected with the cult:

One member of the synagogue's administration, Belenitsky, drew profit from the sale of prayer books and other religious literature. Another member of the synagogue elders traded in places in the synagogue, and unless a proper donation was made to the synagogue the place was denied. Others members of the synagague services also carried out their functions to receive their share. They sold penicillin and other medicine at fabulous prices. In this atmosphere of concern with money and profit from religion they also took large sums from believers for *matzoh*. It is no wonder that the synagogue was the scene of unseemly brawls, which find their end in court.

Lvovskaya Pravda of September 1, 1962, reported a brawl started by a candidate for the position of the synagogue cantor, who is paid a salary of 340 rubles.

Press reports and anti-religious propaganda culminate in a number of letters from the readers who add their bit to charges against Jewish religious practices in Lvov. A reader writes of concern that in the Lvov synagogue "humility" and "long-suffering" were preached, which helped the American imperialists, who planned to impose the blockade on Cuba. This ideology was harmful to Jewish interests, and the Synagogue must be closed. In another article it was claimed that the Synagogue was visited by representatives of the Israeli Embassy, who distributed Israeli propaganda material. It was also the place from which gold and foreign currencies were exported abroad.

Court proceedings involving people connected with the Jewish synagogues in the Soviet Union continued in the following year. In July 1963, three Jews were sentenced in Moscow for baking *matzoh* for sale to their co-religionists. The convicted Jews were Golko Bogomolny, forty-nine, a ritual slaughterer, who was given a one year sentence, and two illiterate women, who received six months' imprisonment each. It was alleged that the women received 10 kopeks (11 U.S. cents at the official rate of exchange) for over two pounds of *matzoh*, while Bogomolny sold it for two and a half rubles a kilo (*The New York Times*, July 18, 1963).

The last reported case in this study concerned three Soviet citizens, including Rabbi Gavrilov, sentenced to death in August

1963 for trading in gold and foreign currencies in Piatigorsk Stavropol region, whilst six other persons were sentenced to various terms of imprisonment (*Sovetskaya Rossia*, August 19, 1963). The death sentence was commuted later by the USSR Supreme Court to fifteen years imprisonment, according to *The Guardian* of January 28, 1964, on the basis of a Reuter dispatch quoting reliable Jewish sources in Moscow.

c. *Incidental Propaganda*

A standard picture presented to the public shows how the nefarious activities of the defendants were brought to light. Even at that stage of the proceedings the public is told of the activities which are declared criminal, even before the court has a chance to examine the evidence and to pass on the case. The next stage is an account of the trial. This usually includes a description of defendants in the dock, in such a way as to leave little doubt that the criminals have committed the crimes with which they are charged, and also that their dishonest trade and criminal activities are easily recognizable from their mien and demeanour. Then comes the closing act of the court drama. The court, faced with the evidence presented in the course of the trial, and in response to the public demand for a severe and just punishment, imposes such a punishment, and society is rid of the nest of rats, ring of criminals, embezzlers of people's wealth, and so on. The style and technique of reporting in the Soviet press is not to furnish data and information on which to form an opinion, but to form such an opinion.

The same technique is used in incidental propaganda, which provides a counterpoint to the main theme. One of the important points which the Soviet press is anxious to make is the danger which the Jewish minority represents owing to their contact with foreigners and foreign countries. The case of the Lvov synagogue, and of the central synagogue in Moscow visited by the members of the Israeli embassy underlined the undesirable aspects of the continued existence of Jewish institutions. Even individual members of the Jewish community may be sources of considerable embarrassment for the good name of the entire country.

So, for instance, *Sovetskaya Moldavia* (July 8, 1962) reported that a certain Jewish lady, Frieda Houzman, who lived in Moldavia, had relatives in the United States, Brazil and France. "From time to time she wrote letters to them complaining of her difficult lot." She said that she lived in poverty, that she dressed worse than a homeless old woman. In other words she begged for help. So these relatives and friends from abroad sent poor Frieda parcels of gifts on many occasions. Holzman immediately sold the contents of these parcels on the black market at speculative prices. She was also an

unauthorized seamstress on the side. This form of private enterprise also brought her a sizeable income. The evidence of Frieda Holzman's nefarious activities was her wealth and a few gold coins which she bought with her earnings.

Another article, in *Vechevnaya Moskva*, exposed a confidence trickster, a certain Grigori Abramovich Tennenbaum, who engaged in promoting artistic photography studios in various local institutions, such as houses of culture, district committees, etc. His aim was to gain official status for his shady operations. He exploited the belief that genuine safety measures could be replaced by a system of posters. In the words of *Vechevnaya Moskva*, "the State allots large sums for labour protection and safety engineering. However, there are economic executives, who are ready to pour all these millions into picture posters such as: 'Do not stand under the tap!' and 'Do not lie under the press!' Isn't this much easier than genuine safe engineering? Such people were a godsend for private operators. Tennenbaum managed to sign a contract for 3.5 million rubles with the Glavgaz enterprise alone."

What irks the author of the report is that machinations of this sort "have legalized the residence in Moscow of a large group of parasites who do not wish to encumber themselves with work useful to society. Let us mention just a few of Tennenbaum's assistants: Gorokhovskiy, Heiman, Pulver, Leder, Shulman and others."

Another example of similar literature is an article in *Partiinaya Zhizn*, which discussed the efforts of a group of Jewish Party members, Freint, Nikonova, Kreins, Rosengurt, Zetser, who dealt with the case of a certain Oksengendler, who was sentenced for theft of government property and expelled from the Party. After Oksengendler's release, not only was he made head of the tableware section in a government store, but the local party organization decided to change his expulsion into reprimand and reinstate him in the party ranks, which demonstrated the wellknown fact that Jews will go to any length in order to help their kind.

Then there are three cases of a slanderer, a professional complainer, and an informer, who by denouncing his chief endeavoured to hide his own misdeeds and avoid criminal liability.

The slanderer (according to *Izvestia*) wrote false accusations, signing other people's names, thus causing serious trouble to innocent people against whom the accusations were directed, and whose names were used: "Yakov Zakharovich Frishter, a former economist at the Ministry of Trade, saw life in dark colours, reacting to every achievement in Soviet life by vile slander." *Vechnaya Moskva* published a letter by Comrade Sudakovaya entitled 'The house in which I live' and an anonymous letter arrived immediately; "allegedly the whole thing is lies, we all live in cellars, with ten people per room . . . in Moscow, people dress in rags, and even

worse than that in other cities . . . Epidemics, but there is no medicine. The achievements of Soviet literature are mentioned – Yakov Zakharovich immediately deprecates and derides the works of leading writers, bringing various calumnies and aspersions against them. The entire world rejoices at the launchings of space ships, but Frishter at this time was pouring buckets of refuse upon the cosmonauts.”

Abram Davidovich Peisakh, as reported by *Kazakhstanskaya Pravda*, was a professional complainant. He was hired as a part-time teacher and discharged four months later. He demanded pay up to the end of the academic year, which he thought was due to him. When his demand was rejected, for the next eight years he wrote unsuccessful complaints, causing interminable investigations and embarrassment to the institution which hired him.

Finally, there was the case of the technical engineer Roman Lazarevich Isakov, who denounced the director of the Krasnovodsky Bread Enterprise. The director stole bread and other materials from the enterprise, and mismanaged the affairs of the bakery. At the same time, the enquiry revealed that Isakov was not without blame. The quality of the bread was poor, there were frequently tons of substandard bread produced, and loaves of bread were found to be underweight. The press report suggests that Isakov reported on his chief in order to hide his own crimes. However, the investigation by the control agencies revealed his own deficiencies.

As the reporter tells his public, Isakov's denunciation, which by itself would be an honourable act, was not motivated by the public interest. It was hinted that Isakov acted from spite and sought revenge. The report speaks darkly of “punishment which was levelled” at Isakov, to which he did not reconcile himself. In addition the report unmasks Isakov as “an impostor”:

During our conversation, you bragged about how much of a specialist you are. In supporting your claim, you referred to an invitation extended to you to go to Dagestan. You would have gone, but the Council of National Economy did not let you go. Here, we have to clarify something. The Council of National Economy answered that they would not detain you. Anyway, could they have bothered about such a chief engineer, who does not even have a secondary education? (*Turkmenskaya Iskra*, October 31, 1962).

On occasion the Soviet press has dropped strong hints that contact with those members of the older generation who were former owners of factories and commercial enterprises might be a source of ideological contamination. The children of such people were singularly exposed to this type of influence, which almost ruled out their chances of becoming useful members of Soviet society. Although the State gave them higher education in Soviet universities, gave them decent and well-paid jobs, it happened all too frequently

that young descendants of the former bourgeoisie participated, albeit only passively at times, in the crimes of the older generation. A full analysis of such pernicious parental influence is the subject of a lengthy article which appeared in *Moskovskaya Pravda* (July 13, 1962) under the suggestive title "How the son grew into a Pig".

The hero of this "story of a criminal case" is Israel Konstantinovich Eidehand, a young man who scurried around from job to job, enriching himself fraudulently. The article presents the "characteristic" sins of the Jew. In spite of higher education, which the State provided for him, he avoided socially useful work. He forged his personal documents; his real purpose in life was to acquire wealth. The title of the article was drawn from a poem by Mayakovsky in which the poet described the consequences of the bad education a man received in his youth at home. And indeed, the article described his home background, where he was reared in an atmosphere of dishonesty by the parents whose highest aspiration was to "get rich quick". His father is depicted as an illegal dealer in building materials and in alcoholic liquor. The young man himself tells of his father's corruption: how he once got a bicycle for the boy by illegally diverting building materials and trading them for the bicycle; how he bribed school officials to obtain good marks for his son; he bribed other officials to get his son an easy job during the war, while other loyal young citizens went into the army and fought for the fatherland. Indeed, Jewish alleged unwillingness to serve in the army during the war is stressed over and over again.

The tale of Jewish dishonesty and shady dealings crops up even when the Jews are not the object of an immediate attack. *Sovetskaya Moldavia* of July 12, 1962, reported the doings of two Orthodox priests. They are portrayed as debauched drukards and fornicators, who exploit the faithful in order to practise sins which they denounce in church. Though the emphasis is on the clergy of the Russian Orthodox Church, the secondary characters, who assist the debauchery of the priests, are an elderly Jewish couple, who act as pimps and procurers of illicit pleasures. Their Jewish home in Kishinev, where priests come to enjoy life, is the centre of their activities. The old Jew, described as an habitu  of the underworld and a pickpocket, provides the "entertainment" for the priests. The article projects the traditional anti-Semitic stereotype of the clever, cunning Jew who outwits even the clever exploiters of human naivet .

This analysis ends with two more samples from the Soviet press propaganda campaign at the time, when the Soviet apparatus of criminal justice has centred its attention on economic crimes: both are on a more general theme, in all probability describing fictitious situations. A feuilleton entitled "The Golden Key" in the Trade

Union paper *Trud* (September 12, 1962) described a merry-go-round of the parasitic machinations. The story started with how a certain Kaplan poses as a poor man in order to hide his illegal acquisition of a house and his diversion of State funds to his own purposes. Dvoskin, another Jew, imitated Kaplan and began to divert government funds to his own advantage. Dvoskin's doings caused a non-Jew, Murygin, to seek illicit profit, and finally another Jew, Abram Mendelevich Snovsky, learned crime from Murygin. At last Dvoskin and Murygin were found out. But the Jew was shown to be cleverer and more cunning than the non-Jew, for Dvoskin had the foresight to register the house which he acquired from his illicit operations in his sister's name, and she could not be touched. The moral of the story was that Jews are a source of demoralization in business and that their doings, particularly when they own property, bear watching.

The feuilleton published in *Sovetskaya Byelorussia* of September 16, 1962, "New comers to the Backwater", dealt with a situation in a factory. The Jewish director surrounded himself with Jewish personnel placed in jobs for which they had no qualifications, so that they could milk the factory for their own advantage. The director and his associate, the factory's chief engineer, began their activities at the factory with the selection and placement of personnel. The factory was expanding, being reorganized and, improving technological processes. Therefore, suitable personnel were necessary. Under no conditions could progress fall behind. But this personnel, in the opinion of Polyakov and Zholnarkevich, must be obedient and industrious, taciturn and apathetic. This is why the selection of such personnel was delegated to a nurse, Ida Borisovna Akselrod. The principle of selection was that a person had to have higher education, but in a field different from that in which he was working. If he was a failure in his specialization, then his papers were adjusted accordingly. So a lawyer was given the job of chief of the labour and payroll office, a timber specialist that of an engineer technologist, a teacher that of an engineer, a mathematician that of a construction engineer, and so on. The director uses his influence to promote his associates to higher positions by providing them with higher education; they receive additional advantages in the form of reconstructed houses and entertainment is organized at the State's expense. There is no specific description of illicit deals or of embezzlements, nor is it hinted that the factory is not run efficiently, but obviously the lot of the Jewish employees is much better than in other factories, and that in the eyes of the author is a grievous and suspicious situation.

The Soviet press deals with the Jew both in terms of individual characteristics and as a member of his national collective. The Jew as an individual is fundamentally anti-social, as his sense of values

does not permit him to accept fully and without reservation the rules of life in a socialist society. His loyalty, instead of to his Soviet fatherland, is primarily to his family, instead of to the high ideals of Leninism, to radical kinship, instead of to honesty and justice, to the protection of the interests of other Jews. Authors of press articles indicate that Jews in government apparatus and in Party positions need closer supervision than other members of Soviet society. Officials in the administration of justice, in social services, police, State and financial control are warned that their watchfulness must be greater when the affairs of a Jew come within their purview. In the press story covering the career of the speculator Gulko the reporter thinks that the manager of a Lvov theatre had demonstrated a lack of proper watchfulness as she did not enquire into Gulko's past, although Gulko's job as a ticket salesman was only temporary, and apparently he was satisfactory in his work. Similarly, a housing administration employee failed in his duty when he registered without thorough investigation a change in house ownership involving a transfer of rights between members of the Jewish community. Some authors of articles published in the Soviet press seem to deplore that Jewish property rights, or their standing vis-à-vis the Soviet authorities are under the equal protection of the law.

The Jews are portrayed as people "whose only God is gold", who flit through the interstices of the economy, cunningly manipulate naive, unvigilant non-Jewish officials, prey upon honest Soviet workers and cheat them of their patrimony. Over and over again, the Jews are depicted as the initiators and master-minds of the criminal gangs; the non-Jews, primarily as the recipients of bribes and as accomplices of the Jewish ring-leaders. The Jews hoodwink not only the innocent non-Jews - but even Jewish accomplices. Even in their mutual relations the Jews lack honesty.

This propaganda in both timing and content seems to bear a direct relationship to the economic crimes trials. Sentences are shaped in the image of the criminal schemes presented to the public at large in the Soviet press feuilletons, which ponderously and piously educate the public in the art of crime detection. As a result, as Soviet trials demonstrate only too frequently, the criminal activities of the Jewish defendants are highlighted, whilst many non-Jewish principals are hidden from the public eye.

The Ukrainian Academy of Sciences in Kiev published in late 1963 a book entitled *Judaism Unadorned*, by Trofim Korneyevich Kichko, in an edition of 12,000 copies. The book was for the use of party cadres and educators as a "valuable manual for propagandists of atheism in their daily work . . ."

Moshe Decter, Director of Jewish Minorities Research, New York, described it in *New Politics* as

a virulent tract, a crude amalgam of falsehoods and distortions, (it) purveys variants of two traditional anti-Semitic themes . . . : the 'Shylock Theme' – the intrinsic connection between Judaism and money; the more modern one is based on elements of the notorious 'Protocols of the Elders of Zion', the worldwide Jewish conspiracy of Judaism, Jewish wealth, Zionism, Israel and Western capitalism . . . What makes the book startlingly unique is its extensive series of anti-Semitic caricatures . . . which are worthy of nothing as much as Julius Streicher's *Der Stuermer* . . . Nothing like them has appeared in the USSR for decades, and one has to look to the Nazi regime for their like. (Jewish religion) is uniquely depicted as the embodiment of the spirit of capitalism and subversive nationalism, and the character of this Jewishness is also uniquely viewed as alien, suspect and actually or potentially disloyal.

World-wide protest voiced against this anti-Semitic publication, including that of Communist organizations in the West, prompted criticism and partial repudiation even from the highest ideological organ of the Soviet Union, the CPSU Central Committee's Ideology Commission. A TASS report of this criticism was broadcast by Radio Moscow on April 4, 1964:

The serious mistakes in the monograph *Judaism Unadorned*, by the Ukrainian historian T. Kichko, were strongly criticized at a session of the Ideological Commission under the Central Committee of the CPSU. It was stressed that in their efforts to expose the reactionary essence of Judaism, the author of the book and also the authors of the preface had wrongly interpreted some questions concerning the emergence and development of this religion. A number of mistaken propositions and illustrations could insult the feelings of believers and might be interpreted in the spirit of anti-Semitism. But there is no such thing in the USSR and cannot be . . . It was said that Soviet opinion could not but object to the erroneous passages in the pamphlet on Judaism. These erroneous views run counter to the Leninist policy of the party on religious and national questions and only foster the anti-Soviet insinuations of ideological opponents who try at any cost to create a so-called Jewish question.

Conclusions

There is no doubt that the concentration of law and propaganda on the suppression of economic crimes evidences a serious moral malaise in Soviet society at a time when the stage reached in post-revolutionary development of a Communist State should, in theory, have eliminated the kind of cupidity that has been rampant. It is obvious, too, that private enterprise, honest and dishonest but in both cases illegal, has been carried on in the very heart of public enterprises. It is also clear that there has been an insidious and sometimes subtle propaganda campaign directed against the Jewish people of the Soviet Union, specifically against those charged with economic crimes and also against the supposed general characteristics of Jews that have been reiterated for centuries. If the reports of trials for economic crimes are even reasonably complete, the number of Jews receiving death sentences and severe terms of

imprisonment is greatly disproportionate to their number as a minority group.

The charge has been raised of Jewish persecution, linking their difficulties over synagogues or Passover bread with the unwelcome attention which Jewish defendants have received in the press in connection with economic crimes. But it is considered that the link between anti-Semitism and the suppression of economic crimes is indirect only. There is anti-Semitism in the Soviet Union, but there is not sufficient to warrant an accusation of organized discrimination or persecution. They have been made the target of a dangerous propaganda campaign, and Jewish participation in economic crimes has been highlighted if not actually magnified.

The religious difficulties faced by the Jews in the Soviet Union are in many respects shared by people of other religious faiths. Spiritual ties that run counter to the tenets of atheistic Communism have long been discouraged. There is undoubtedly also a certain amount of anti-Semitic prejudice at all levels of Soviet society, as there is in many others where the State itself would not seek to discriminate or persecute. The traditional activities of Jews in history – finance and commerce – are not activities which are warmly welcomed in a Communist society. It is a simple matter to link the picture of the money-grubbing Jew of anti-Semitic fancy with the picture of the archvillains of capitalist cupidity. This has certainly been done by the Soviet press, but the most that can safely be said is that the picture painted of the moral malaise in the Soviet Union diverts attention towards Jews because the primary object of the Soviet polity is to divert attention away from the real truth, to find scapegoats. The real truth is a veritable cancer in the vitals of ideology – capitalistic corruption even within the Party and in local economic administration and a spectacle of amazing fortunes made quickly. That unpalatable fact explains the severity of the laws on economic crimes, even to the extent of reversing a highly-publicized trend in the new penal policy. It is a tragedy for the Soviet Jewish people that they have been made the scapegoat for the transgressions of those whose guilt it would be dangerous to make public. They are victims of the “highest interest of State”, the need to bolster up belief that the Communist way is the right way and the successful way, and that capitalism is both evil and less successful.

The latent anti-Semitism in the USSR is possibly being used by the Soviet authorities as a weapon to render unpopular economic offences which appear to be rampant. This is probably the most charitable view which can be taken of the apparent anti-Semitism which seems to have influenced Soviet policy. It is earnestly hoped that even if this were the dominating factor which influenced Soviet

authorities in this regard, they have and will continue to realise the real and grave injustices which must result from such a course. Anti-Semitism represents the most dangerous form of racialism in the world; no question of expediency can ever justify its use as a political, social or economic weapon.

STAFF STUDY

THE ROLE OF THE LAWYER IN THE ECONOMIC AND SOCIAL DEVELOPMENT OF HIS COUNTRY WITHIN THE FRAMEWORK OF THE RULE OF LAW*

The scope of this essay

The considerations connoted by the title of this essay are at first glance so broad that the intellect rebels at the idea of attempting to do justice to the subject within the confines of anything less than several years' devotion to the production of a work consisting of several heavy volumes. Even confining one's thought, temporarily, to the meaning of "economic and social development" presents intellectual challenges of an awesome nature, for one is candidly prompted to see immediately that at the base of the problem is the very severe fact that there are interminable variations of interpretations as to the meaning of these concepts. In fact, one would be hard pressed to discover any considerable number of persons who would aver that they are *against* economic and social development, but the moment that a specific proposal is made in the name of fostering such progress, there will burst forth a veritable barrage of verbal combat on the question of whether the proposed action would indeed be a specific example of economic and social development.

Setting aside for the moment any attempt to provide a working definition for the purposes of this paper, it may be well to consider that economic development can be, in certain periods of history, antithetical to social development. Especially is this so if economic development is to be virtually equated with a state of affairs in which emphasis is placed upon the maximum utilization of the available natural resources, and the thought is further compounded if the utilization is directed toward the creation of capital equipment rather than consumer goods. It can hardly be doubted that creation of capital equipment, for the purposes both of building up the strength of the country and for providing a better life for the coming generation, falls well within the meaning of economic development. This may also be characterized as true without regard to whether the growth is a result of deliberate foresight or whether it is seen, by necessity in retrospect, as the virtual accidental and fortuitous result of specific motives which were themselves unconcerned with any such grand design. In either event, social development stagnates or retrogresses, or, depending upon the pace, takes second place to economic development.

* This essay won the first prize in the essay contest of the International Commission of Jurists (English language).

Even where geography blesses the people with abundant natural resources, the maximum utilization of those resources, considering the scientific and technological overtones of modern history, requires an outpouring of effort and sweat on the part of a large majority of the population, and with this activity there must perforce coincide a de-emphasis on education, economic equality, sanitary and medical facilities, adequate housing, and all those elements which result in the maximum flowering of the personality for every individual. It is very easy today, for example, for citizens of the United States to criticize the brutality of the Chinese or Russian or Cuban or Arabic methods in attempting to quicken the pace of economic development at the cost of human suffering, while forgetting that the same thing happened in the United States notwithstanding the differences in attitude and theory which were and are used to justify the facts.

From the foregoing considerations it appears that there may be definitions, at least of tonal if not of literal clarity, forced upon us to the effect that economic development places emphasis upon maximum utilization of material resources, while social development places emphasis upon maximum growth of human endowments. It also appears that the economic development must be emphasized first, because without this there is a physical impossibility of realizing maximum social development.

With the problem thus stated, even if far too simply so, it would be superficially easy to examine the lawyers' role to determine if they, at an early stage in economic development, emphasized legal postulates which would aid in that development, and whether, in an era of economic maturity or in an era of maximal material production, they emphasized legal postulates which would foster social development — including preferences for the conditions which would promote the greatest personality flowering for *all* members of the community. But such an approach would prove little by itself, even if the questions should be answered favourably to the lawyer, for the reason that it may be that the aid was only accidental or a by-product of other motives. One must, within the confines of this subject, be concerned with the reasons relating to current and prospective expectations, not with retrospective patterns, if there are to result in conclusions of any value for the future. Otherwise, one depends upon mysterious explanations, with their promptings to the effect that one cannot really evaluate current developments, either to praise or condemn, because, after all, a century hence may show the overall results to be valuable. There is a certain enticement about this, of course, but if it is followed the concomitant is a refusal to make decisions about anything, to ignore the hard facts as they currently appear, and to surrender all to "faith". The very intellectual effort involved in considering such questions as dealt with here dictates a rejection of the fatalistic approach.

A much more revealing approach to the role of the lawyer is to examine what his intentions are, consciously or sub-consciously, to examine his political and sociological theory, to find out what he wants to do, to see what he actually does in specific situations, to notice, at various intervals, what are the actual results of his role, and to consider much of this against the background of his legal training. These are the major specific questions under study here, and they will be approached from several vantage points. One must hasten to caution, however, that not *all* lawyers are being dealt with. Whatever the conclusions, they will be applicable only in general terms, more specifically to the controlling segment of the legal profession. There are great individual and personality variations, and no general conclusion can be applicable to every lawyer. It is also to be noticed that, unless the context dictates otherwise, "lawyers" includes both attorneys and judges, or the legal profession. Further, the data here emphasize development in the United States.

At the beginning of the American Revolution, the aristocratic class was very reticent to break the ties with Great Britain, and the educated lawyers of that day were part of or ideologically attuned with the aristocratic group. They were slow to cast their lot with the revolutionaries, and the majority of those who did waited until the tide of events became somewhat obvious in favour of the revolution. They blanched at the doctrines spread by Thomas Paine, later characterizing him as blood brother of Satan;¹ and they were not enamoured of the antics of the hick lawyer, Patrick Henry.

During the revolution many of the aristocrats distrusted the

¹ In regard to Thomas Paine, the following partial account of activities in Congress for November 19, 1811, appears in the Boston newspaper, *The Weekly Messenger*, November 29, 1811: "A bill for the temporary government of Louisiana, was reported; and a motion was made to strike out a clause which made a *freehold property* a *necessary qualification for a voter*. This motion occasioned a debate until half after three, and was not then decided. Mr. Randolph took a conspicuous part in it, and exhibited a great deal of genuine wit, sarcastic reproach, some argument, and much good sense. He scouted the doctrine of *equality and universal suffrage*, formerly so much in vogue among demagogues, rogues and tyrants; and declared it impossible for even the ingenuity of *Tom Paine* and the *Devil* to make it apply to modern governments. Mr. Smilie took much offence at Mr. R's *firm of Paine* and *Devil*, and declared the former to have been one of the greatest of statesmen, and one who, by his writings was the main prop of the revolution. Mr. Randolph apologised, but said he could never think of Paine without associating the other gentleman; as they seemed to have been at times engaged in their different vocations in much the same plan. — He would not, he said, admit that Paine had been so very instrumental in propping the revolution: — he believing that the *Washingtons* and *Hancocks* of the day would as speedily and as gloriously have accomplished it, had they never heard of that miserable English *stay-maker*. The gentleman from Pennsylvania, he said, might deify and build altars to him, but he must be excused from joining in the worship. He rejoiced his religion and politics were unlike those of the gentleman from Pennsylvania."

state legislatures, and tried, therefore, to establish a strong national government by way of the Articles of Confederation because they could more easily control one government than thirteen.² Their worst fears were realized when the state legislatures passed laws designed to aid the agrarian groups at the expense of the "moneyed interests". Although they disagreed upon the establishment of a stronger government for many and various reasons, they were sufficiently frightened by the agrarian revolt called "Shay's Rebellion" to attempt to establish a strong national government. There is still debate over the economic interests of those who composed the Constitutional Convention,³ but it can hardly be denied that protection of property was one of the foremost if not the major consideration. They belaboured the "excesses of democracy". Governor Morris and John Rutledge said, "Property is the main object of society," that it was of more value than "life and liberty".⁴ Benjamin Franklin, the most democratic delegate there, got nowhere with his proposal to eliminate property qualifications for voting. The story of the usurpation involved in writing a new Constitution, and in providing for the effectuation of it by nine rather than by thirteen states, is well known, as are the "lawyer-like" tactics used by the Federalists during the ratification controversy. John Marshall took a hand in supporting the Constitution, and he was never heard to take umbrage at the statement by his friend, Alexander Hamilton, that the people were "beasts" and should be ruled by the "rich, wise and wellborn".

The Role of the Courts

John Marshall, after becoming Chief Justice, established for the lawyers what has since served them so well: judicial review. In plausible but by no means constitutionally prescribed language, he perpetrated one of the best legal usurpations known to the law.⁵ Perhaps he was aware of similar predilections entertained by Coke, who

. . . once the upholder of prerogative (as a Crown lawyer), discovered a new point of view from the bench of Westminster. . . . Coke now transferred to the common law, of which he had become the oracle, that supremacy and pre-eminence which he had ascribed to the Crown while he was Attorney-General.⁶

² Cf. Merrill Jensen, *The Articles of Confederation* (Madison: University of Wisconsin Press, 1940), *passim*, and original sources cited therein.

³ Cf. Charles A. Beard, *An Economic Interpretation of the Constitution of the United States* (New York: The Macmillan Company, 1923); Forrest McDonald, *We the People: The Economic Origins of the Constitution* (Chicago: University of Chicago Press, 1958).

⁴ Jonathan Elliot (editor), *Debates on the Adoption of the Federal Constitution . . .* (Philadelphia: J. B. Lippincott Company, 1937), V, 278-279.

⁵ *Marbury v. Madison*, 1 Cranch 137 (1803).

⁶ Theodore F. T. Plucknett, *A Concise History of the Common Law*

In establishing the other "leg" of judicial review in *Fletcher v. Peck*,⁷ Marshall cut down the power of state legislatures, and aided entrepreneurs and speculators, by holding that a state grant was a contract, and therefore it could not be interfered with by the state after once having granted it. Marshall knew, and by inference admitted, that the constitutional provision prohibiting states from interfering with obligations of contract was meant to apply only to *private* contracts, but literally he could interpret it as including public contracts. Ever afterwards, lawyers could argue for literal interpretation or historical or "spiritual" interpretation, depending upon which way they wanted the decision to go. Marshall also aided the cause of the entrepreneur in the *Dartmouth College*⁸ and *Gibbons*⁹ cases, further restricting the power of state governments to interfere with economics and the "freedom of contract". Marshall withdrew from the *Fairfax v. Hunter*¹⁰ case, as he should have done in *Marbury v. Madison*, because he was an interested party, but his faithful disciple Joseph Story gave a decision favourable to Marshall, basing it on precedents which Marshall had established. It was Story who viewed the upsurge of Jacksonian democracy with consummate depression.¹¹

The Fourteenth Amendment was passed to protect individual civil rights, but the Supreme Court used it to protect business enterprise in the *Slaughter House Cases*¹² by reading their proclivities into "due process," and rejected the real spirit behind the Fourteenth Amendment by declaring unconstitutional legislation to enforce it

(Rochester: The Lawyers Co-operative Publishing Company; second edition, 1936), p. 217. Coke has been attributed with explaining that when he had difficulty in adducing precedents for the decision he wished to reach, he would pen: "As the old Latin maxim saith:" - and then he would invent the maxim. Thomas Reed Powell, "The Logic and Rhetoric of Constitutional Law," *Journal of Philosophy, Psychology and Scientific Method*, Vol. 15 (1918) p. 654.

⁷ 6 Cranch 87 (1810).

⁸ *Trustees of Dartmouth College v. Woodward*, 4 Wheaton 518 (1819).

⁹ *Gibbons v. Ogden*, 9 Wheaton 1 (1824).

¹⁰ *Fairfax's Devisee v. Hunter's Lessee*, 7 Cranch 603 (1813).

¹¹ Cf., particularly, letters to Mr. Justice McLean and to Miss Harriet Martineau. William W. Story (editor), *Life and Letters of Joseph Story* (Boston: Charles C. Little and James Brown, 1851), II, 208-209, 277, 279-281. Chancellor Kent was also sunk in gloom, particularly as a result of the case of *Charles River Bridge v. Warren Bridge*, 11 Peters 420 (1837), whose doctrine of strict construction of corporate charters was appalling. The decision, he said, "undermines the foundations of morality, confidence, and truth. . . . What destruction of rights under a contract can be more complete? . . . When we consider the revolution in opinion, in policy, and in numbers that has recently changed the character of the Supreme Court, we can scarcely avoid being reduced nearly to a state of despair of the commonwealth." [James Kent], "Supreme Court of the United States," *New-York Review*, II, 387, 389, 402 (April, 1838), quoted in Arthur M. Schlesinger, Jr., *The Age of Jackson* (Boston: Little, Brown and Company, 1950), p. 327.

¹² 16 Wallace 36 (1873).

in the *Civil Rights Cases*.¹³ In doing so it is not too much to surmise that the Court took notice of the change in the equilibrium in Congress as a result of the re-admission of Southern Congressmen, divining correctly that parliamentary tactics could prevent any action unfavourable to the Court and its decision. This technique appears even more pronounced in the income tax cases. In *Springer v. United States*¹⁴ the Court found income taxes to be indirect and thus constitutional – unanimously; but fifteen years later, in *Pollock v. Farmers Loan and Trust Company*,¹⁵ they found taxes on income derived from land and state bonds to be direct, by a vote of six to two, and thus unconstitutional; and in *Pollock v. Farmers Loan and Trust Company*¹⁶ they found by a five to four vote that taxes on other income were inseparable from those on land and bonds, and thus all income taxes were invalid. They “guessed” at what Congress meant, and conformed that guess to their own predilections, realizing that the equilibrium within Congress had changed to the more conservative side, thus making an overruling of the Court unlikely. They were perhaps also impressed by counsel’s argument about “this communistic march”, and that there must be protection “now or never”.¹⁷

In this brief survey, the details of Supreme Court “legislation” cannot be presented. Memory should take cognizance of the child labour decisions,¹⁸ however, in which the Court held that the commerce or taxing powers of Congress could not protect children from exploitation of the grossest kind (their “freedom of contract” had to be protected), and legislation to provide minimum wages for women was also held invalid because it interfered with the freedom of women to contract.¹⁹ And the story of the invalidating of the New Deal measures to combat depression (usually by five to four majorities), and the resulting Roosevelt-Court battle, along with a reversal of the Court’s attitude, are too well told elsewhere to justify recording here.

Now the above brief survey of Supreme Court actions is not meant, relatively speaking, to be critical of the Supreme Court. The Court depends in large part upon the arguments pressed upon it by attorneys,²⁰ it is passive in the sense that it must wait until a

¹³ 109 U.S. 3 (1883).

¹⁴ 102 U.S. 586 (1881).

¹⁵ 157 U.S. 429 (1895).

¹⁶ 158 U.S. 601 (1895).

¹⁷ 157 U.S. 533 (1895).

¹⁸ *Hammer v. Dagenhart*, 247 U.S. 251 (1918); *Bailey v. Drexel Furniture Co.*, 259 U.S. 20 (1922).

¹⁹ *Adkins v. Children's Hospital*, 261 U.S. 525 (1923).

²⁰ Cf. Benjamin R. Twiss, *Lawyers and the Constitution: How Laissez Faire Came to the Supreme Court* (Princeton: Princeton University Press, 1942).

question is presented as a case before it can be considered, and it is administratively impossible for it to act favourably upon more than about fifteen per cent of the requests for review. If anything, it is considerably less "legal minded" than the lower federal and state courts; the members of the Supreme Court are quite often chosen from groups who are not "practising" attorneys, who have earned their reputations, for example, in the political arena rather than in legal practice. They are thus, to a degree, more cognizant of political, economic, and sociological considerations than is the case for members of the practising profession. Further, they have reached the pinnacle of their careers. They have about as certain tenure as it is possible, in a practical world, to have, better tenure, politically speaking, than lower federal court judges, and far better, politically and formally, than state judges. Relative to other judges and to other members of the bar, they can be expected normally to be a step ahead of the rest of the bar in the search for justice, or, in modern terms, in concern for long-range social development.

But the Supreme Court can be only a step ahead – and only a short step at that. For the Supreme Court has no troops to enforce its decisions, and it cannot compel the President or Congress to act. It is noteworthy that Congress is habitually composed of a majority of lawyers, and they are the largest single group in the state legislatures,²¹ but just as important is the fact that the Court cannot dictate a spirit of cooperation to the lower courts or to the legislatures or to the practicing attorneys, and it cannot prevent them from obstructing the dictates of the Supreme Court. Only by virtue of the words coming from the highest court, by what weight its prestige can be made to count, and by way of the constant interrelation of these factors with the wide political spectrum can the lawyers be brought along in the direction of change.

The difficulty of overcoming lower court obstructionism is best illustrated by a consideration of what occurs after the Supreme Court has made a decision, normally by way of remanding for further decision not in contradiction to the Supreme Court's ruling. This formula leaves a tremendous gap through which lower courts can, for example, drive to the same decision on different grounds, not to mention the fluidity allowed lower courts by way of "interpretation" of the Supreme Court's opinion. These techniques concern "evasion" as distinct from "defiance".

²¹ Thus, considering the question of economic and social development in terms of the role of the whole legal profession, consider the sterility of the protestation of judges, so often heard, that a legal rule is antiquated and unjust and should have been changed long ago, but it is the legislature which must make the change. This protest is, of course, all the more hollow in jurisdictions having an "integrated" bar association – one in which membership is compulsory.

One example of this obstructionism is the case of Hawkins, a Negro, who was denied entry into colleges in Florida and who, after nine years of litigation which included favourable verdicts by the Supreme Court, still failed to receive a specific court order directing his admittance.²² Another specific example is related to the famous 1954 segregation decision.²³ Five years after the decision neither of the two Southern communities in which the original school cases began had yet been required to admit a single Negro child to a hitherto white school, and in one of them the federal district judge set 1965 as the date for compliance.²⁴ Of course, federal district courts were given wide discretion as to dates of implementation with respect to the segregation problem, but the same thing occurs where little or no discretion is given. Thus, in the famous *Mallory* case²⁵ the Supreme Court held unanimously that in the District of Columbia confessions obtained between arrest and preliminary hearing were inadmissible as evidence on the ground that they had been coerced unless the hearing followed "as quickly as possible" after arrest, and in the instant case eight hours' delay did not meet the standard. Nevertheless, "by means of explaining, limiting, and distinguishing, the district and circuit judges in the District of Columbia have been able to permit the use in evidence" of confessions obtained during such delays to the extent of sixteen out of twenty-one cases.²⁶ Obstructionism at the state court level is, of course, more flagrant than at the lower federal court level. A 1954 report indicated that in eleven terms, forty-six Supreme Court reversals of state decisions required additional litigation, and that in almost half of these cases the party which had been successful in the Supreme Court was unsuccessful in the subsequent state court action following remand. With one exception, the evasion was accomplished by interpretation rather than defiance.²⁷

Sometimes lower courts, legislatures, and special interest groups interpret the Supreme Court's opinion to mean virtually the opposite of what the Court ordained. Thus, in *Zorach v. Clauson*²⁸ the Supreme Court upheld a state arrangement under which students could be released from public school classes to go to private insti-

²² *Hawkins v. Board*, 162 F. Supp. 851 (1958).

²³ *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954).

²⁴ 164 F. Supp. 786 (1958).

²⁵ *Mallory v. United States*, 354 U.S. 449 (1957).

²⁶ Walter F. Murphy, "Lower Court Checks on Supreme Court Power," *The American Political Science Review*, 53: 1024 (December, 1959). This article should be consulted for a detailed account of the extent of lower court obstructionism.

²⁷ "Evasion of Supreme Court Mandates in Cases Remanded to State Courts Since 1941," Note, *Harvard Law Review*, 67: 1251 (1954).

²⁸ 343 U.S. 306 (1952).

tutions to receive religious instruction. This arrangement was to be distinguished from one which allowed release from regular classes to attend religious instruction classes within the school building, an arrangement which had been held unconstitutional.²⁹ Despite the Court's decision in the latter case, many communities continued with impunity to hold released time classes in public school buildings, and the *Zorach* decision was in general spirit taken as reversing the earlier decision. By the time the metamorphosis had reached its fruition, the *Zorach* decision was being read as demanding rather than permitting released time for religious instruction. In fact it was said "It is now the 'inalienable right' of every parent of a public school child, if he so requests it, to have his child excused for 'religious observance and education'. In no state or local community can this right be denied."³⁰ To rephrase the old saw that the Constitution is what the Supreme Court says it is, one commentator says, with respect to a particular precedent, that "the precedent in reality consists of what influential partisans and decision-makers say the Supreme Court says it is".³¹

The immediately foregoing examples emphasized the difficulties of obtaining compliance when in certain periods of history, and in fields limited by the Supreme Court by way of selecting the types of questions it chooses to deal with, the Court happens to be a step or so ahead of the controlling segment of the bar generally. For the most part of United States history the Court has been in general accord with the organized bar, as reflected by the general approbation and esteem in which it was held by the organized bar. There were exceptions, of course, as evidenced by Louis Brandeis (whom the organized bar opposed³²), and the public, as in the early New Deal days, has on occasion been ahead of the Court in demanding change. But whether the Court is in step with the organized bar or a short step ahead, the important fact obtains that it is the general attitude of lawyers which controls the trend of economic and social change within the realm of verbal manipulation of the law. Inquiry must be made, then, into the psychological, sociological, economic, and educational atmosphere which prompts them in the direction of general uniformity of verbal manipulation.

²⁹ *McCullom v. Board of Education*, 333 U.S. 203 (1948).

³⁰ Erwin L. Shaver, "A New Day Dawns for Weekday Religious Education," *International Journal of Religious Education*, 28: 8 (July-August, 1952), quoted in Frank J. Sorauf, "Zorach v. Clauston: The Impact of A Supreme Court Decision," *The American Political Science Review*, 53: 789 (September, 1959), *q.v.* for a detailed account of the development here touched upon.

³¹ Sorauf, *op. cit.*, p. 791.

³² The following statement is merely indicative of the opposition of the bar to the Brandeis appointment: "Austin G. Fox, a New York lawyer retained by Boston attorneys and capitalists, mailed *ex parte* statements in the form of

The Role of the Practising Lawyer

Historically in England the lawyer developed a service to sell. The nature of that service can best be understood by paying attention to the desires of the clientele and the composition of that clientele. Even the common law chroniclers make it very clear as to the most important class of society who bought the services offered by the lawyers. Plucknett says "the attorney was a great convenience to wealthy landowners who were constantly involved in litigation and found it troublesome to appear personally, as also the ecclesiastical bodies and others . . ." ³³ It seems not too unreasonable to conclude that the orientation of these lawyers was favourable to the wealthy class, and that to buttress the monopoly of that class was the principal reason for the existence of the lawyers. ³⁴ Especially does this seem reasonable to conclude when it is noted that the lawyers themselves were successful in having promulgated the Royal Writ of 1292, the most remarkable features of which were "its policy of putting legal education under the direction of the court, and its promise to successful students of a monopoly of practice. The attorney's branch was henceforth a closed profession, reserved

briefs, as news and as raw materials for editorials, to every state in the Union, opposing Brandeis' confirmation." Alpheus T. Mason, *Brandeis and the Modern State* (Washington: National Home Library Foundation, 1936), p. 157.

William Howard Taft, Elihu Root, and all the living ex-Presidents of the American Bar Association memorialized the Senate that Brandeis was "unfit". George Sutherland, later to become one of the most conservative justices of the Court, was one of the members of the Judiciary Committee who signed the minority report against Brandeis. "It is interesting that views which, if anything, were basically those of an advanced Jeffersonian should have been held by men of eminence like an ex-president of Harvard University to disqualify Mr. Justice Brandeis for membership of the Court." Brandeis "had sinned in two ways. As a practicing lawyer, he had been the emphatic defender of the legal rights of organized labour, and he had played perhaps the leading part in his generation in exposing financial malpractices by the great corporations." Harold J. Laski, *The Danger of Being A Gentleman and Other Essays* (New York: The Viking Press, 1940), p. 123.

³³ Plucknett, *op. cit.*, p. 194.

³⁴ A well-known American lawyer attributes a similar state of affairs to the modern period: "The financial interests are amply represented by legal skill, while the vast disorganized public, composed of investors, workers and consumers, is not represented at all. The complete commercialization of the American bar has stripped it of any social functions it might have performed for individuals without wealth. . . . Intellectually the profession commanded and still commands respect, but it is the respect for an intellectual jobber and contractor rather than for a moral force. . . . The American bar suffers in comparison with either the English or the continental system." A. A. Berle, Jr., "Modern Legal Profession," 9 *Encyclopedia of the Social Sciences* (New York: The Macmillan Company, 1933), pp. 340, 343-345, quoted in William T. Fryer and Carville D. Benson, *Cases and Materials on Legal Method and Legal System* (St. Paul: West Publishing Co., 1950), pp. 642-643.

for those who had been educated to it, and admitted to it, in the official course.”³⁵ Eventually the attorneys consolidated their position, “becoming a closed guild in complete control of the legal profession. Within their fraternity are united the bench and the leaders of the bar . . .”³⁶

The story of the bar in the United States has been recorded by Roscoe Pound, one of the most highly respected jurists in the United States. He fears that the greatest danger to the legal profession is the possibility that it will be socialized, unionized or bureaucratized in the service of the Welfare or Super State,³⁷ and he warns as a concomitant that “Lawyers must be put on guard by the movement, as it is put, to socialize medicine.”³⁸ Lawyers must defend against this development, and they must do it by organization of an integrated bar, that “a selective or non-selective but voluntary Bar” will not suffice.³⁹ The certain implication is that there must be membership of all, even if involuntary. This is closed shop unionism on the basis of profession, cutting across all other organizations, in which attorneys are employed; unionization which involves the mixing of attorneys with other trades or professions in which they are employed is to be deplored.⁴⁰

Dean Pound repeatedly defends the organized legal profession on the grounds that it is devoted to “public service” and that the

Another famous American lawyer, in his twilight years, passed similar judgment: “Civilization spins faster and faster, and . . . one must frankly confess that the law often acts less as a lubricant than as a clog. Our traditional legal system actually tends to gum the whole works. . . . The law in spite of its supposedly divine derivation has inevitably been used for the benefit and aggrandizement of those in power . . . rather than for the best interests of all the people.” Ephraim Tutt, *Yankee Lawyer: The Autobiography of Ephraim Tutt* (New York: Charles Scribner’s Sons, 1944), pp. 391, 393. (This Mr. Tutt is the real Mr. Tutt, not the fictionalized “Mr. Tutt” made famous by the many court stories of Arthur Train).

³⁵ Plucknett, *op. cit.*, p. 196.

³⁶ *Ibid.*, p. 200.

³⁷ Roscoe Pound, *The Lawyer From Antiquity to Modern Times* (St. Paul: West Publishing Co., 1953), pp. 356-362.

³⁸ *Ibid.*, p. 355.

³⁹ *Ibid.*, p. 359.

⁴⁰ On April 22, 1960, the Supreme Court of the United States heard arguments on the question of whether it was unconstitutional to require a worker to join a union which uses part of his dues money to support political views or candidates he personally opposes. In an exchange with an attorney, Chief Justice Earl Warren said he could see little difference between union politicking and a bar association which engages in lobbying or takes a public stand on controversial issues. He noted that in States having so-called integrated bars attorneys must be members of the bar association in order to practice Law. “I belonged to an integrated bar for 30 years,” he said, “and I know there was a great difference of opinion on things they advocated.” *The Evening Star*, Washington, D.C., April 22, 1960.

earning of a livelihood is only a secondary and incidental coincidence. Assuming that this is a high objective, he makes no effort to show that members of the profession actually discount monetary rewards.⁴¹ But far more important is the absence of any attention to a prescription of just what an attorney does in his devotion to the public service. The things actually done in this regard appear to be meeting together with one another in order to promote a spirit of fellowship and conciliation, to exchange "scientific" advances in jurisprudence, to defend the profession against "unqualified" interlopers, to prescribe a schedule of minimum fees, and to promote "the interests of attorneys". These vaguely described activities appear to add up to the public welfare.

The period of deprofessionalizing of the bar, roughly from 1830 to 1870, Dean Pound reviews with sadness.⁴² Having indicated earlier that the flower of the American Bar was out of step with the social movement bringing on revolution against England, resulting in their loss to the country because they remained loyal to the Crown, thus indicating "the conservatism characteristic of lawyers,"⁴³ he in the overall attributes the second fall during the Jacksonian epoch to a rise in "democracy" combined with the necessary emphasis on individualism along the expanding frontier. As to the former, the bar was viewed as too "aristocratic."⁴⁴ As to the latter, "the prime characteristic of the pioneer is versatility . . . He would leave every one free to change his occupation as and when he likes and to take up freely such occupation as he likes".⁴⁵ This is a pretty fair description of the type of man praised

⁴¹ A more subtle analysis with respect to status may reveal that there are considerations other than monetary rewards which are important to lawyers. Consider the point of view of Thorstein Veblen: "The profession of law does not imply large ownership; but since no taint of usefulness, for other than the competitive purpose, attaches to the lawyer's trade, it grades high in the conventional scheme. The lawyer is exclusively occupied with the details of predatory fraud, either in achieving or in checkmating chicanery, and success in the profession is therefore accepted as marking a large endowment of that barbarian astuteness which has always commanded men's respect and fear." *The Theory of the Leisure Class* (New York. The Mentor Press, 1953), p. 156.

⁴² Pound, *op. cit.*, pp. 223-242.

⁴³ *Ibid.*, p. 173.

⁴⁴ There can be little doubt that the bar also viewed itself as aristocratic. Cf. Alexis de Tocqueville, *Democracy in America* (translated by Henry Reeve; New York: The Colonial Press, 1899), I, 277-285. "The aristocratic character, which I hold to be common to the legal profession, is much more distinctly marked in the United States and in England than in any other country." P. 281. Tocqueville remarks about "the propensities of legal men, and their prejudices in favor of existing institutions." P. 284. "The lawyers of the United States form a party which . . . penetrates into all classes of society; it acts upon the country imperceptibly, but it finally fashions it to suit its purposes." P. 285.

⁴⁵ Pound, *op. cit.*, p. 236.

so often by American lawyers as "individualist," a self-reliant individual, not dependent upon a paternal state or, logically, upon any other organization. At least in this respect, "individualism" is not good for lawyers although it is admirable vis-à-vis other trades and professions in general.

Dean Pound admits that "there was undoubtedly ground for much dissatisfaction with many features of the administration of justice"⁴⁶ during the deprofessionalizing era but feels that attacks upon the bar, lowering and liquidation of educational standards, and allowing anyone to practise law could only make matters worse, that it was insufficient professional standards that brought about the defects in the first place. This is undoubtedly correct, but one can hardly expect the common people to have more wisdom than the professional bar itself; insufficient wisdom, inadequate ethical and personal standards by the bar are more likely to provoke attack from the "Great Beast"⁴⁷ of the people than reasoned and calm insistence by them that standards be raised. Especially is this true when the legal profession is as disdainful and condescending as the aristocratic bar was, and tolerant of their suffering as indicated in the late nineteenth century of Spencerian "survival of the fittest". There is further ground for antipathy on the part of the populace when, in spite of the theory of popular sovereignty, the lawyers can nullify the plain dictates of the people and produce an opposite effect. Dean Pound gave an example of this phenomenon, pointing out that the Constitution of Indiana from 1851 until the present time has contained the provision that "every voter . . . might practice law without more," but says, approvingly, that this provision has been "shorn of effect"⁴⁸ by the courts by holding "that practice of law in that state is not an unqualified constitutional or natural right but that the courts may make reasonable rules and regulations for admission."⁴⁹ The constitutional provision is still there in spite of at least twelve attempts to amend

⁴⁶ *Ibid.*, p. 241. In support of Pound's view here, consider the feelings of the people as expressed by Frederick Robinson in a speech to the Trade Unions of Boston on July 4, 1834: "One of the judges in this city, not long since, charged the grand jury to indict the working men who attempt by unions to fix the price or regulate the hours of labor; although this judge, and indeed all the judges, are members of a secret trades union of lawyers, called the bar, that has always regulated the price of their own labor and by the strictest concert contrived to limit competition by denying to everyone the right of working in their trade, who will not in every respect comply with the rules of the bar." Joseph L. Blau (editor), *Social Theories of Jacksonian Democracy* (New York: The Liberal Arts Press, 1954), p. 329.

⁴⁷ Attorney Alexander Hamilton's characterization.

⁴⁸ Pound, *op. cit.*, p. 231.

⁴⁹ *Ibid.*, p. 226, citing *In re McDonald*, 200 Ind. 424, 164 N.E. 261, 262 (1928).

or repeal it since 1880.⁵⁰ What the populace refused, the bar demanded and made prevail. The people of Indiana may attempt somehow to reconcile this situation with the ever-recurring lawyer's phrase about government according to law, or rule by law and not by men.⁵¹

The references here to Dean Pound are not intended to detract from the lustre of that great jurist. Intent or not, one may despair of doing so, for his reputation is well beyond injury by latecomers. He is fairly viewed as representative of the legal profession's defenders as constituted today, however, and his defence must be examined, not particularly to praise or condemn it with reference to the past or even to the present, but to evaluate its adequacy with respect to the future. For all that, the record of the past is the tool with which to condition the future. Dean Pound is to be understood as proud of his life in the legal fraternity, thankful for the praise heaped upon him by his legal brethren, and not likely therefore to tinker with the ungrateful thought of being very critical in a study of the profession of his brethren when that study is sponsored by that very profession. His cited work is one of several survey studies of the legal profession, "under the auspices of the American Bar Association". His evaluation praises the organized bar. His message urges further organization for protection of the profession against the "government". Nothing is said of the apparent necessity to see beyond and below the "law", of the apparent need to understand the critical public questions facing society today. Nothing is said of the apparent necessity to develop a comprehensive view of all society, of the need to overcome the inherent conservatism of the law and of lawyers. Coping with these necessities

⁵⁰ *Ibid.*

⁵¹ It would be tedious to catalogue many of the instances in which the legal profession "rises above" the Constitution while castigating others for allegedly doing the same. A current example is one in which the Federal Republic of Germany is evaluated. The author approvingly notes that the Federal Constitutional Court, as guardian of the Basic Law, "has not only taken into consideration positive norms, but also, higher and natural law. Furthermore, it has not only maintained that acts of the legislature could be incompatible with the constitution, but, by distinguishing between superior and inferior constitutional norms, it has also admitted the possibility of unconstitutional constitutional norms. Not only the *pouvoir constitué*, but also the *pouvoir constituant* could do wrong. This approaches an elevation of justice over all positive law, including constitutional provisions." Gottfried Dietze, "The Federal Republic of Germany: An Evaluation After Ten Years," *The Journal of Politics*, 22: 138-139 (February, 1960). For those who recall that Hitler rose to power "legally", there may be wonder as to the precedent which enables the Court to "rise above" the Basic Law to invalidate legislative acts. If it can do this, why can it not rise above the Basic Law to *validate* either legislative or executive acts?

apparently goes beyond the abilities of a professional organization dedicated principally to maintaining its "interests".

In examining the role of the lawyer with respect to social development nowhere does it stand out that the organized bar is concerned with examination of the body politic in a search for changes which could lead to greater equality of opportunity. There is no concern, except in vague and pious terms, that the innate abilities of each individual should have opportunity to develop to their maximum regardless of the economic condition into which the individual was born. The productivity of the nation now makes such an approach possible for the foreseeable future, probably to a greater extent than anywhere in the world, but the organized bar is silent upon the topic. Needless to add, it has always been silent about the demoralizing effects of too great wealth in the hands of individuals - demoralizing upon the wealthy individuals themselves as well as upon the public at large. In short, it is only negative in regard to any movement directed toward economic democracy.

Attention should be given momentarily to important subjects with which the organized bar, as represented by the American Bar Association, has concerned itself over the last few years.

The ABA opposed the Constitutional Amendment which would have given power to the federal government to regulate child labour (which amendment became a dead issue, of course, after the decision by the Supreme Court in *United States v. Darby*, 312 U.S. 100 (1941) that the federal government had such powers); it opposed the Roosevelt Court Reform Bill, while defending a conservative Court; it opposed National Health Insurance bills; it opposed the Genocide Convention and the Covenant on Human Rights; it opposed a bill providing for public development of atomic energy for peacetime purposes; and it was opposed to having an ABA observer with the United States delegation to the United Nations.⁵²

Equally significant are important proposals which the American Bar Association supported. These included the Submerged Lands Bill (providing for the grant of off-shore oil deposits to certain states after the Supreme Court had held in 1947 that they belonged to the United States Government in *United States v. California*, 332 U.S. 19); a proposed constitutional amendment placing a twenty-five per cent limit on income tax rates (thus the maximum rate of tax for a millionaire would be twenty-five per cent while the minimum rate for a poor man would be twenty per cent); a special lawyers' tax benefit bill; and Congressional legislation designed to override recent Supreme Court decisions relating to basic procedural

⁵² Cf. proceedings of the House of Delegates, contained in the *American Bar Association Journal*, 1937 through 1959.

rights.⁵³ It commended the activities of the House Un-American Activities Committee and the Senate Internal Security Sub-Committee, and included praise for the McCarthy Subcommittee for "conducting its inquiry in the exposition [sic] of Communist activities in a dignified lawyerlike way, with full recognition of all the constitutional rights of those they called before them".⁵⁴

Speeches by Presidents of the ABA are in some instances more revealing than resolutions passed by the House of Delegates insofar as they offer more long-range suggestions as to how lawyers should conduct themselves. One example in this regard was a speech made in November 1941 before the Illinois State Bar Association by ABA President Walter P. Armstrong. Against the background of the "liberal revolution" in the Supreme Court which permitted more "interference" in the economic realm, the ABA had become disenchanted with the Court and was now searching for ways to bypass the Court. As far as adjudication of state legislation was concerned, Armstrong suggested the implication that one tactic would be simply for attorneys to be careful not to raise "federal questions" during the litigation, thus making appeal to the Supreme Court impossible. "Already cases are arising where rights are asserted . . . and where counsel are careful not to make any claim under the Federal Constitution," and he "predicted" that there would be more developments along this line.⁵⁵ Included in this tone of leadership is an almost clear, albeit subtle, conspiratorial approach designed to prevent both plaintiff and defence lawyers from urging every right belonging to their clients. For those following the suggestion there would appear to result a clear violation of the lawyer's obligation to his client. Those refusing to follow could not look forward to ABA support when their names are considered for federal judicial appointments, for example. The ABA says that President Eisenhower was brought around to submitting all judicial candidates for ABA approval.⁵⁶

The single topic upon which the ABA expended most of its energies in the 1950's was that of amending the Constitution to restrict the treaty power, under the leadership of former ABA President Frank E. Holman. In 1953 the ABA bestowed upon him the Association Gold Medal for Conspicuous Service, "for his work in rousing the country to the dangers of international treaties which

⁵³ *Ibid.*

⁵⁴ Proceedings of the House of Delegates, 38 *American Bar Association Journal* (1952), p. 428.

⁵⁵ Walter P. Armstrong, "The Increasing Importance of State Supreme Courts," 28 *American Bar Association Journal* (1942), pp. 2-3.

⁵⁶ 43 *American Bar Association Journal* (1957), p. 1050.

may infringe upon freedoms guaranteed by the Bill of Rights.”⁵⁷

This is not the place to go into the minute details of the long history of the so-called “Bricker Amendment”.⁵⁸ Suffice it here to say that Holman and other lawyers on the Senate Judiciary Committee participated with alacrity in what may be termed a “numbers game” by way of taking advantage of a switch of the numbers of the Senate Joint Resolutions which included various versions of the proposed amendment. The *real* Bricker Amendment was one submitted by Senator Bricker under the number S.J. Res. 1, which had sixty-four Senatorial co-sponsors who, at least, wished the matter to be studied. The severely restrictive ABA version was numbered S.J. Res. 43, and was sponsored by one Senator. The version favourably reported by the Senate Judiciary Committee was the ABA version, but it came from the Committee as “S.J. Res. I”. After that the ABA “Brickerite” supporters gave to the public the information that one of the best reasons for supporting the “amendment” was the fact that sixty-four Senators had co-sponsored it. Others, including the former Dean of Notre Dame Law School, participated in this “numbers game”.

This summary review indicates that the organized legal profession has emphasized subjects dealing with its monopolistic position or “standards”,⁵⁹ or with those opposing changes in the socio-economic realm, or with those, perhaps most important of all, partaking if diversionary characteristics, diverting the public eye from topics involving self-analysis and evaluation while it chases nebulous “patriotic” goals, and denounces “subversion”, “do-gooders”, “One Worlders”, and those opposed to “the American Way of Life”. Even the Dean of the American legal profession, Roscoe Pound, characterises lawyers as inherently conservative.⁶⁰ To be successful they must attach themselves to the prevailing élite. Lawyers are dealers in words, and those words will not sell unless they please those who have the wherewithal to buy. One observer has stated it: “the ruling élite elicited loyalty, blood, and taxes from the populace

⁵⁷ 39 *American Bar Association Journal* (1953), p. 876.

⁵⁸ The details are available in Elbert M. Byrd, Jr., “The Constitution and the Treaty Power: A Study of Treaty-Restricting Proposals,” unpublished Master’s thesis, The American University, Washington, D.C., 1954. *Cf.*, also, Elbert M. Byrd, Jr., *Treaties and Executive Agreements in the United States* (The Hague: Martinus Nijhoff, 1960).

⁵⁹ One is reminded of Clarence Darrow’s remark when a young law clerk whom he knew to have failed to pass his bar examination, took it a second time six months later. When Darrow again saw the boy he asked, “Well, did you pass?” “Yes sir, I sure did,” replied the young chap. Darrow murmured, “And now I suppose you’ll want the standards raised.” Irving Stone, *Clarence Darrow for the Defense* (New York: Bantam Books, Inc., 1958), pp. 327-328.

⁶⁰ See p. 16, *supra*.

with new combinations of vowels and consonants.”⁶¹ An editorial in a judicature journal expresses the idea in less arresting words: “‘Bread and Butter’ topics always have had the lion’s share of emphasis in legal education, both pre- and post-admission, and perhaps it will always be so, since he who pays the piper is entitled to call the tune.”⁶²

It would appear necessary to conclude that the role of the lawyer in economic and social development in the United States has been generally negative and even obstructionist. As to economic development the role may have been positive by accident, i.e., through no fault of the lawyers themselves, by way of defending corporate enterprise which was efficient in utilization of natural resources at the expense of human resources. As to social development in a period of economic abundance, the era is still too near to discern accurate outlines, but the immediate appearances indicate that the legal profession has not contributed to social development even by accident. One must hasten to understand, however, that this conclusion does not mean that the legal profession has been useless. Its greatest value, historically speaking, may well be that of compelling acceptance of the status quo by words rather than by the alternative method of bloodshed, for without this function perhaps economic development could not have proceeded. In this regard, the role of the lawyer may be compared with the role of some ministers in the nineteenth and early twentieth centuries: “When the [linen and hosiery] mills were built, often a first act of the new mill owner was to build a church, put the pastor on his payroll, and reap the profits of a theology propagating the doctrine that the meek shall inherit the earth.”⁶³ It is not necessary to condemn the minister here as useless or as a charlatan. Under the prevailing conditions he may have performed a valuable service by providing some consolation to his flock. The ministers and the lawyers may well have held the forts while other forces worked out the intricacies of economic development. But this, of course, gives them no claim upon the title of intentional supporters of economic and social development. It would appear more accurate to assess the development as occurring in spite of their concern or desire, or even in spite of their good intentions.⁶⁴

⁶¹ Harold D. Laswell, *Politics: Who Gets What, When, How* (New York: McGraw-Hill Book Company, Inc., 1936), p. 156.

⁶² Editorial comment, *Journal of the American Judicature Society*, Vol. 42, No. 5 (February, 1959), p. 149.

⁶³ V. O. Key, Jr., *Southern Politics in State and Nation* (New York: Alfred A. Knopf, 1950), p. 145.

⁶⁴ Although typically extreme, the following commentary by “G.B.S.” on practitioners, whose “good intentions” he grants, may deserve thoughtful study: “If by inequality of income you give your doctors, your lawyers, your clergy-

Legal Education

The problem contemporarily of the method and scope of legal education, even from a mere objective viewpoint, is difficult indeed, and often discussed and debated. The problem of scope is principally a problem of the curriculum structure. On the one hand there is the felt urgency to provide training in the technique of the law, and on the other there is the question of the degree to which, simply put, attention should be given to the purposes of the law by way of training in such subjects as philosophy, politics, political economy, comparative government, and general history. Thus far, in the

men, our landlords, or your rulers an overwhelming economic interest in any sort of belief or practice, they will immediately begin to see all the evidence in favour of that sort of belief and practice, and become blind to all the evidence against it. Every doctrine that will enrich doctors, lawyers, landlords, clergymen, and rulers will be embraced by them eagerly and hopefully; and every doctrine that threatens to impoverish them will be mercilessly criticised and rejected. There will inevitably spring up a body of biased teaching and practice in medicine, law, religion, and government that will become established and standardised as scientifically, legally, religiously, constitutionally, and morally sound, taught as such to all young persons entering these professions, stamping those who dare dissent as outcast quacks, heretics, sedition mongers, and traitors. Your doctor may be the honestest, kindest doctor on earth; your solicitor may be a second father or mother to you; your clergyman may be a saint; your member of Parliament another Moses or Solon. They may be heroically willing to put your health, your prosperity, your salvation, and your protection from injustice before their interest in getting a few extra pounds out of you; but how far will that help you if the theory and practice of their profession, imposed on them as a condition of being allowed to pursue it, has been corrupted at the root by pecuniary interest? They can proceed only as the hospitals and medical schools teach them and order them to proceed, as the courts proceed, as the Church proceeds, as Parliament proceeds: that is their orthodoxy; and if the desire to make money and obtain privileges has been operating all the time in building up that orthodoxy, their best intentions and endeavours may result in leaving you with your health ruined, your pocket empty, your soul damned, and your liberties abrogated by your best friends in the name of science, law, religion, and the British constitution. Ostensibly you are served and protected by learned professions and political authorities whose duty it is to save life, minimise suffering, keep the public health as tested by vital statistics at the highest attainable pitch, instruct you as to your legal obligations and see that your legal rights are not infringed, give you spiritual help and disinterested guidance when your conscience is troubled, and make and administer, without regard to persons or classes, the laws that protect you and regulate your life. But the moment you have direct personal occasion for these services you discover that they are all controlled by Trades Unions in disguise, and that the high personal honour and kindness of their individual members is subject to the morality of Trade Unionism, so that their loyalty to their union, which is essentially a defensive conspiracy against the public, comes first, and their loyalty to you as patient, client, employer, parishioner, customer or citizen, next." George Bernard Shaw, *The Intelligent Woman's Guide to Socialism and Capitalism* (Garden City, New York: Garden City Publishing Company, Inc., 1928), pp. 461-462.

United States, the technique approach has predominated. Few law schools require a course in jurisprudence, for example; some offer it as an elective, and many, the catalogues indicate, do not even offer it as an elective.

Until a few years ago, the American Bar Association paid scant attention to the problem of curriculum. A study of the Association which was highly favourable, although emphasizing technical and procedural rather than substantive matters, found with regard to curriculum, nevertheless, that:

The social emphasis should be more clear cut, since law is a public calling. . . . Legal training should not be purely legal in character but should include a wide cultural background as well as training in the sciences of economics and politics, with some emphasis on law reform.⁶⁵

In the *Survey of the Legal Profession*, conducted by the organized bar during the late 1940's and early '50's, some attention was paid to the matter of curriculum by the survey teams, particularly from the perspective that, "since law is a means of social control, it ought to be studied as such."⁶⁶ The summary of the report of the investigators found that "satisfying the objectives of such a thesis would require a drastic retooling of the entire program of legal education as presently constituted. This has yet to be done at any school of law."⁶⁷

One of the inspectors said, "of the nine schools I inspected, six showed no impact of the modern world whatsoever."⁶⁸ Another reported: "The main stream of legal education flows on much as before . . . There are still courses in Contracts, Torts, Property, and Trusts, retaining their old names and shapes; and even in those courses which have been revamped and renamed the appellate decision is the focus of study still. Law and the social sciences remain unintegrated."⁶⁹ It appears, as a result, that the typical American lawyer is destined to remain ignorant of the social sciences, and will think he is performing his rightful function by conveyancing and advising, and drawing wills, and trying to win decisions by citing "cases" deriving from problems arising long ago and far away.⁷⁰

⁶⁵ M. Louise Rutherford, *The Influence of the American Bar Association on Public Opinion and Legislation* (Philadelphia: The Foundation Press, Inc., 1937), p. 367.

⁶⁶ Albert P. Blaustein and Charles O. Porter, *The American Lawyer: A Summary of the Survey of the Legal Profession* (Chicago: The University of Chicago Press, 1954), p. 172.

⁶⁷ *Ibid.*

⁶⁸ *Ibid.*, p. 173

⁶⁹ *Ibid.*, p. 172.

⁷⁰ By contrast, the first and second year curriculum in France contains: History of social institutions and events, Political economy, International institutions, and Financial institutions; the third and fourth years offer such subjects as

Closely related to the problem of curriculum is the "case method" of teaching. This subject, too, was evaluated by the survey teams, and they found that "its position of pre-eminence now appears to be on the wane".⁷¹ It was candidly reported that:

Even at its best the case method has been subjected to serious criticisms. One is that the system is highly time-consuming and that thus only a very small proportion of even judge-made law can be covered by a study of the cases themselves. Another is the fact that after the first year at law school there is a distinct lack of interest on the part of students in reading cases. . . . Complaints are heard that the case programs are lacking in perspective as to the scope and implications of the law. . . .⁷²

More specifically, the study of "cases" by the "case method" is not by any stretch of the imagination a real study of *cases*. It is a review of a highly condensed version of an appellate court's highly condensed version of what transpired in the case. As a lecturer in the Yale School of Law has pointed out, the opinions of the judges are of great importance,

. . . but they rarely give anything like an adequate factual picture of the primary dispute or of the psychological and social forces that gave rise to it. . . . The case-law theory of legal education stopped short when it had pointed out the superiority of judicial opinions over opinions about such opinions; it lacked the drive to carry through until the actual facts of legal behavior should become the subject matter of legal study.⁷³

Political science methods, History of political theory, History of economic thought, Statistics, Financial economics, Economic geography, and International economic relations. *The Teaching of Social Sciences: Law*, Report prepared by Charles Eisenmann for The International Committee of Comparative Law (Geneva: UNESCO, 1954), pp. 129-131. It is interesting to note that David Hoffman, one of the earliest United States law teachers to devote great attention to legal curriculum, included the subjects of "moral and political philosophy" and "political economy". Hoffman was one of the early founders of the University of Maryland Law School, teaching there from 1823 to 1832, but his plans to reform American legal education failed. "His views on legal education were far in advance of his time." Francis R. Aumann, *The Changing American Legal System: Some Selected Phases* (Columbus, Ohio: The State University Press, 1940), pp. 102-103, 109.

⁷¹ Blaustein and Porter, *op. cit.*, p. 169.

⁷² *Ibid.*

⁷³ Edward Stevens Robins, *Law and the Lawyers* (New York: The Macmillan Company, 1935), pp. 67-68. Another law teacher, formerly of the Columbia Law Faculty, points out that any law teacher who has participated in a controversy from its inception to its conclusion on appeal realizes how inadequate is the report of it which appears in a casebook. The opinion of the judge frequently does not picture the controversy at all. Thomas I. Parkinson, "Are the Law Schools Adequately Training for the Public Service?" *American Law School Review*, December 1935, pp. 292-293, cited in Esther Lucille Brown, *Lawyers and the Promotion of Justice* (New York: Russel Sage Foundation, 1938), pp. 74-75.

A typical casebook contains thousands of "cases". Several of these cases are assigned in advance for the students to "brief" or condense in preparation for class recitation.⁷⁴ In approximately one-half or more of the "cases" the student finds that they are already so utterly condensed that further condensation is virtually impossible. Thus, the student will be called upon to "brief" a case which appears in the casebook as follows:

ELEASON V. WESTERN CASUALTY & SURETY CO., 1948, 254 Wis. 134, 35 N.W. 2d 301. Defendant insured, knowing that he was subject to "spells" rendering him unconscious for several minutes, drove a truck; while driving he became unconscious from an epileptic seizure and killed plaintiff's decedent. *Held*, judgment for defendant reversed. The finding of the trial court that the driver was not negligent was error.⁷⁵

The poor student is embarrassed at the prospect of trying to "brief" this case. At the beginning of the year he tries to tell it in his own words, substituting a synonym here and there; near the end of the year, he reads it orally, verbatim, without hesitation. In either event, the professor beams at the excellent recitation, and says, "Ya-as. Since he knew he was subject to the spells, it was negligence for him to drive in spite of that knowledge. Mr. Smith, take the next case."

The next case is of similar import, and so is the professor's retort. Occasionally the student ventures a question which probes at the implications for society of some of the points made, or questions the dogmatic assertions of the appellate court as to the facts of the case. He will receive some sort of answer, but the "spirit" of the reply casts doubt upon the wisdom of asking such questions. Too often the reply will be some such as "that is a question for your course in evidence during the second year".

The sincere and discerning student is not above the thought that his intelligence comes near to being insulted. As the months go by, as for example in the course in Torts, he discovers that there have been only two or three principles presented, and that all the "cases" superficially revolve around these principles, normally a principle of absolute liability for deliberate trespass to real property, or a principle that in negligence cases all should act as a "reasonable man" would act. The intelligent student does not have to be

⁷⁴ It is important to note that in England, the birthplace of the Common Law, the "systematic method," not the "case method," is used. "Casebooks - and this is a significant fact - are rare." *The University Teaching of Social Sciences: Law, op. cit.*, p. 116.

⁷⁵ Warren A. Seavey, Page Keeton, and Edward S. Thurston, *Cases on Torts* (St. Paul: West Publishing Co., 1950), p. 179.

told of these principles during an entire academic year in order that they be grasped by his memory. He knows that in an actual case he will have to "search" for all the similar cases he can find in order to buttress his case with the courts. Two weeks' instruction in Torts should be adequate to get the few principles across to the student. The remainder of the year could be devoted to bibliography and search methods or to some of the social science subjects which cannot now be "crowded" into the curriculum. But, one must face it, attention to such subjects as political theory is going to raise questions about the values of society, and this involves revealing the foundations upon which the status quo is erected. Those intangible foundations are all the more fragile when recognized, and the resulting antipathy and possible ostracism for the offending law school is to be avoided in a realistic world.⁷⁶

As it is, those students, who can pretend to be sincere while discussing in a vacuum concepts which in reality cannot be divorced from other concepts, will stay in law school and will eventually condition themselves into thinking automatically that they are grasping the essentials of life. They become attached to the mode of thought of the prevailing élite, and they eventually become "leaders" of the community. They are all too likely to remain ignorant of much of the story of mankind. Lawyers are often seen to gasp in disbelief, for example, when told that there were many who opposed the adoption of the United States Constitution in 1788. And with respect to contemporary issues concerning their own profession, they have been heard to respond that they are in favour of separation of the races when asked if they favour or oppose an "integrated" bar.

The Positive Duties of the Lawyer

Looking at the contemporary and future scenes, one may consider whether the social, economic, educational and cultural aspira-

⁷⁶ Commentators occasionally refer to some of these problems, stating, for example, that "in order to graduate a mature lawyer, some modifications in the curriculum are imperative. But too little implementation has been done too late." Junius L. Allison, "Toward A Mature Candidate for the Bar Through Curriculum Reform," *The Student Lawyer*, February, 1960, p. 19. The author, who is Associate Director of the National Legal Aid and Defender Association, makes other pertinent remarks: ". . . the social impact of the practice of law is so far-reaching and . . . the function of the lawyer in our society is so significant, the future of the profession and the general welfare of society depend upon a broader education of those who plan to practice law. . . . There is much justification for the criticisms made of the traditional philosophy on law school curriculum. . . ." He adds that his criticism is not of the whole case method, although "this system has tended to isolate the law student from his social surroundings."

tions of *all* the people may be fulfilled under the rule of law in the absence of a *positive* attempt by lawyers, to include judges, teachers, attorneys, and lawyer-legislators, directed toward that end. Now to be facetious about this, the answer is that such cannot be done either with or without a positive approach by lawyers – because the economic aspirations of some individuals are so huge that fulfilling them automatically prevents the fulfilment of more modest aspirations. And closely related to economic aspirations are those of a social, cultural, and psychiatric nature. The question becomes one, therefore, of whose aspirations deserve precedence as to fulfilment, and to what degree. In essence, the question involves a consideration of whether necessities of life shall take precedence over sumptuous display or vice versa; whether basic service to society shall take precedence over basic dis-service to society, or vice versa; whether a contributor of goods and services to society shall be viewed as more valuable than a consumer of goods and services, or vice versa; whether, basically, a garbage collector is more valuable to society than a striptease dancer, or vice versa; simply, whether the useful shall reap greater rewards than the useless, or vice versa; finally, whether an earned income shall be taxed less than unearned income, or vice versa.⁷⁷ The answer today to every one of these questions can only be given as “vice versa”. And the law and the lawyers so provide.

The positive law today decides who shall get what. The old adage that each shall be able to retain what he has produced is as dead as John Locke even if it were ever alive. In a technological world no individual produces anything by himself, and if one could retain only what one has produced, the result would be that no one would have anything. Many hands lend themselves to the production of a given number of commodities, and the law then directs how these commodities shall be divided among the community. If there is to be “development”, which means change in the status quo, of course the lawyers must make a positive attempt to change the positive law. The questions remain as to whether they dare attempt it, and whether they would succeed if they tried.

It can be laid down as a certainty that the trend cannot be reversed by individual lawyers themselves. The money which can buy unfavourable publicity would soon banish the individual lawyer

⁷⁷ Without even trying to maximize his income, a person with a million dollars, by investing his money in state and municipal bonds, can realize a return of approximately \$ 40,000 per annum upon which he pays not a cent in federal income tax. An unmarried *working* man with a similar income pays nearly \$ 20,000 in federal income tax. Congress, overwhelmingly dominated by members of the legal profession, is responsible.

to outer darkness.⁷⁸ It can also be laid down that even the organized bar would fail, in the improbable event that it should attempt the change, if it relied upon appeals couched in terms of justice, humanitarianism, equal opportunity for every individual, or sincere emphasis upon the dignity of man. The only possibility, and it is a mere possibility, of inciting peaceful change is to base it on the impulse of fear, and this is a fear of external developments.

The fear is not one of atomic or hydrogen bombs, for if they are unleashed all questions will be solved with a good deal of finality. The fear involves what happens if the bombs do not fall. The fact is that the United States and the Soviet Union are in an economic and social race to gain the approval of the rest of the world. The economic and sociological structure which appears most "fair", most "just", more nearly in accord with democracy, to include economic democracy, is going to be favoured by the rest of the world. This is the cold, hard truth which emerges after the myth propaganda of both East and West has been penetrated or virtually ignored by the under-educated, under-developed peoples of the world. There will be a gravitation toward the system which appears, in the overall, most satisfying to the urge for justice. There will be an awareness of the concept of equal opportunity, which involves a similar starting point for all in the race of life, and a search within the two systems to determine which is more efficient in rewarding merit rather than inherited position or position gained by gouging exploitation. A searching eye will evaluate the relative absence of racial and colour bigotry, for most of the peoples concerned are not of the "white" race. Excluding the irrelevant nuclear war, this is the kind of battle which faces the United States. If we play a losing hand, the United States will be isolated geographically and will then have to choose between outright surrender, gradual attrition, or immediate destruction.⁷⁹

⁷⁸ "For the practising lawyer, the successful career is dependent upon his ability to serve the interests which dominate the State. . . . For the most part, he can only make a reputation by appearing for clients of this kind. To use the law to their detriment is to get the reputation of an 'unsound' man. But an 'unsound' man is rarely, in this realm, a successful man; and an unsuccessful lawyer does not belong to the classes from which the judiciary is chosen." Harold J. Laski, *op. cit.*, pp. 120-121.

⁷⁹ There occasionally appears in print just a hint of the implications for lawyers of the current United States situation. Thus, student lawyers may read that they should broaden their horizons (presumably, on their own initiative). "I urge you to do this," a Professor of Law at the University of Michigan says, "not because your horizons are narrower than those of today's profession, but because the bar as a whole needs its horizons broadened. . . . [Lawyers] fail to articulate and interpret actions of society in the light of legal principles because of a natural desire to get ahead professionally by serving clients who have rather narrow interests. . . . Little Rock is as important in Michigan or

To compete in this struggle will require an intensity of soul searching not easy to engender; it will require a degree of social psychoanalysis which is highly painful. It will require a method of approach which historically has been avoided like the plague by ruling élites. They normally have resigned themselves to being so unconcerned with the actual state of affairs that they think they are talking sense when they say the mob should be advised to eat cake when it runs short of bread. To break through the thickly encrusted layers created by self-congratulatory sloganeering and resonant myths which pleasingly rationalize the existence of the *status quo* is an operation very rarely to be expected. Whether the lawyers can do it will depend on whether they have uncommon wisdom along with a willingness, if need be, to sacrifice the better paying clients. If they are successful, they shall have played a positive role transcending temporal and geographical, economic and social development; they shall have fostered the development of a human kind yet unknown to the world.

ELBERT M. BYRD, JR.

Seattle or Bismarck as it is in Little Rock itself. Lawyers need to interpret to all citizens [but first to themselves] the problems caused by such events in relation to the Constitution in the light of world affairs and international policy." Charles W. Joiner, "Whole Lawyers or Client Caretakers?" *The Student Lawyer* June, 1960, pp.5-6.

INDEPENDENCE OF JUDGES IN THE STATE OF ISRAEL*

The first and basic quality one may demand of a judge in the exercise of his judicial function is the absolute independence of his judgment. The independence of the Judiciary is one of the cornerstones in the structure of any democracy, whatever its form. It not only guarantees that justice will be done and judgments firmly based on truth; it is also an indispensable condition of the Rule of Law. Surely it cannot be said to be sufficient that this independence should in practice be assured to the judge while he is actually sitting in judgment; it should become operative in the very act of his appointment and taking his seat on the bench. Moreover, it should be guaranteed by law, and should apply not merely to the processes of trial, but to all the activities of the judge as such and to the routine administration of his office. No consideration of policy or expediency whatsoever, even of the most trivial or hypothetical nature, should, even in the extreme of theoretical possibility, be able to influence the impartial process of applying the law. And justice demands that, whatever be the actual practice, the effective application of this theory be patent to the eyes of the ordinary citizen, enshrined in the written law.

Small wonder, then, that many countries have expended considerable efforts in an attempt to ensure this independence of their judges, both in theory and in practice. Not all have succeeded. Some have achieved this aim in practice, while theoretically traces of dependence may be said to subsist in the manner judges are appointed or promoted in judicial rank; elsewhere, theoretically all may be regulated for the best, but certain manifestations of dependence are to be discerned in practice.

The Judiciary in 1948

In Israel, it is to this problem that we turned our attention, rather than to that of the training of the judge for the exercise of his judicial function. When our State was established fifteen years ago, we were able to take over from the British Mandatory regime – at least so far as the Courts were concerned – a system and a tradition. But with regard to the personnel to be charged with the

* An address delivered to English jurists in Stoke on Trent and Birmingham, and to American jurists at Yale University.

operation of our judicial institutions, we were in the nature of things bound by the material at hand to follow the system in force at the time. With the exception of a few members of the Mandatory Judiciary, we had no lawyers versed in our law who had had specific training for judicial office and we tried to select those whose rich experience in the practice of law seemed to fit them for that high purpose. That approach to the selection of judges was therefore dictated by necessity. But let it be said at once that, thus far at least, we are well content with the result. Nor do I think that there could be found in Israel any serious demand for a change in the system from this point of view.

Selection during the first years of the state

However, we came to be concerned, as I have stated, with what may be termed the primary and fundamental qualification of the judge, namely, his complete freedom from all external influence in his impartial decision upon the issue before him. During the first years of the State, Justices of the Supreme Court were appointed by the Government with the approval of the legislature, whilst other judges were appointed by virtue of an adaptation of the law in force at the termination of the Mandate, by the Minister of Justice, and they retained their office at his pleasure. Those powers devolved upon the Minister by way of substitution for the British High Commissioner for Palestine, along with fairly extensive powers appertaining to the organisation and administration of the Courts. Nevertheless, there has never been the slightest ground for complaint as to any appointments which have been made, or as to the exercise of any of the other powers conferred upon the Minister of Justice. This was in accordance with the traditions which we took over on the establishment of the State, but I feel that to no small extent it may also be attributed to the personality of the Minister himself, and perhaps also to the fact that he consulted the various committees of Judges and lawyers which he appointed, informally, to advise him.

Nevertheless, though it was true that in practice the situation could be regarded as satisfactory, it could not be said that there was no room for misgivings from a theoretical point of view. In the result, there was in Israel, as in some other countries, a discrepancy between theory and practice, and for the reasons I have outlined, it was to the elimination of this discrepancy that we applied our minds in search of a solution. I am happy to say that that solution – as we believe – has been found, and for some years now Israel has been fortunate in having a system of appointment and promotion of judges which is both democratic and liberal, both theoretically sound and practically effective. Since, so far as my

knowledge goes, the system finds a parallel in few other countries, if in any, it may be of some interest briefly to review its principal provisions.

In 1953, the *Knesset*, as the Israel Parliament is called, enacted the Judges' Law to regulate the mode of appointment of judges of all grades, and to lay down the qualifications required of them, their term of office and scales of salary, as well as the conditions for the termination of their service.

Appointing authority under the provisions of the Judges' Law

Under this law, the authority appointing the judges is the President of the State. He cannot, however, exercise that power at his own discretion or on his own initiative, but he may act only upon the advice of a nine-member Committee, which lays its proposals before him.

The Committee, the composition of which must be published in *Reshumot* (Official Gazette), consists of the following:

- the Minister of Justice;
- another member of the Government appointed by the Government;
- the President of the Supreme Court;
- two Justices of the Supreme Court elected by the Justices thereof for a period of three years;
- two members of the *Knesset* elected by it by secret ballot, who serve for the duration of their membership in the *Knesset*, or, when the *Knesset* has appointed other members to replace them;
- two advocates appointed by the Council of the Bar Association for a period of three years, subject to the approval of the Minister of Justice.

The Committee is presided over by the Minister of Justice. But the law does not confer upon him, in that capacity, any voting rights additional to those enjoyed by his colleagues. He is no more than *primus inter pares*.

Proposing a candidate for judgeship

The manner in which candidates for judgeships are proposed for the consideration of the Committee is also prescribed by the law. Whenever the Minister of Justice considers that a judge should be appointed he must give notice to the effect in *Reshumot* (the Official Gazette) and convene the Committee. Persons wishing to be candidates for appointment may submit their names to the Committee, but the persons empowered to propose candidates to the

Committee are not obliged to confine themselves to those persons who have submitted their own names, and in fact in practice suitable persons who have not submitted their names are approached with a view to obtaining their agreement to accept an appointment if they are recommended by the Nominations Committee, while if a judge of a grade above the lowest grade is to be appointed the names of all judges of any grade lower than the required grade are automatically considered without any application being made by them. If any judge wishes to ensure that he would never be offered a High Court judgeship, his surest course would be to ask for one.

Proposals may be made by the Minister of Justice, by the President of the Supreme Court, or by three members of the Committee jointly. The source from which a nomination originates does not determine its ultimate fate, although the proposal of a candidate by the Minister or by the President of the Supreme Court tends to facilitate and expedite the initial stage of the appointment procedure.

The tendency is to appoint judges of the higher grades from among judges of the lower grades, unless there is an obviously more suitable candidate among the members of the Government Legal Service or among the advocates in private practice.

Six members of the Committee constitute a quorum, and its decisions on the proposals laid before it are taken by majority vote of members participating. The appointment of a judge is therefore not dependent upon the views of only one member or even of a minority of members of the Committee, no matter who that person is or who constitute that minority.

The promotion of judges within the judicial hierarchy, as I have explained, is regulated in the same manner as their initial appointment. The independence of the judge is thus assured during the whole period of his office as it is when his appointment is first made, for it may indeed be said that, in view of the composition of the Committee, neither fear nor favour of any person or institution in the State can possibly be a matter for the slightest possible consideration of any judge.

Dealing with an application for appointment

The first step in dealing with a person's application for appointment is an investigation of a private nature as to his character, his conduct in private and public life, and his professional qualifications. This completed, the candidate is summoned to appear before the Appointment Sub-Committee, which examines him closely by putting to him questions relating to his professional and general education and his grasp of public and social affairs. Candidates are

not required to have any special academic qualifications nor do they have any special examination, as is the case in some countries.

A candidate having passed the above stages and having been selected by the Committee, the Minister of Justice brings the proposal to appoint him before the President of the State, and the President makes the appointment without further consideration.

The President signs the instrument of appointment in the presence of the candidate, who then and there, in accordance with the Judges' Law, makes an affirmation of loyalty to the State and to its laws, and undertakes the obligation set out in the Holy Books: "To judge the people justly, not to distort justice, and to favour none."

Judges sever connections with political parties

It is generally accepted – though the matter is not mentioned or even hinted at in any law – that a person appointed to the Judiciary in Israel must sever all connections which he may have with any political party.

The crowning provision of the Judges' Law, which is designed to establish and enshrine the independence of the judiciary, is to be found in the section which prescribes that "there is no authority over a judge but the Law". The State of Israel has by this law achieved a Bench of Judges who stand in fear of none, and whose eyes are turned only to the law, to the end of applying it in accordance with the best of their moral understanding and their conscience.

A judge retains his office from the date of his making the affirmation described above until the day of his retirement on pension or, in the event of his resignation, the date when his resignation takes effect, or, until his removal from office in consequence of the disciplinary action which I shall describe later, an event which I hope we shall never see.

A judge is required to retire on pension at the age of seventy, or before reaching that age if the Committee decides, upon the basis of a medical opinion given in accordance with general rules laid down by it, that the judge is by reason of the state of his health unable to perform his duties. He may retire on pension at the age of sixty if he has served for twenty years, or at the age of sixty-five if he has served for fifteen years, or at any age if he so requests and his request is approved by the Committee. In the computation of the period during which a judge has served, there will be taken into account, in whole or in part, any period of State service or in the Service of any other institution approved by the Finance Committee of the Knesset, in accordance with general rules prescribed by the Committee.

A judge may resign by submitting a letter of resignation to the Minister of Justice, and his tenure of office will terminate upon the expiration of three months from the submission of the letter of resignation, unless the Minister of Justice has consented to a shorter period. There have been several cases of judges resigning and returning to private practice as an advocate, and in one case a judge resigned in order to become a Professor of the Law Faculty of the Hebrew University, Jerusalem.

Qualifications for appointment

The qualifications required for judicial appointment are not uniform, but differ for each of the three levels of jurisdiction, namely, the Magistrates' Court, the District Court, and the Supreme Court.

The Magistrates' Courts have jurisdiction to try civil actions where the subject matter or the amount of the claim does not exceed I£ 1,500 and criminal cases in which the punishment may be imposed does not exceed three years' imprisonment. The District Courts are Courts of first instance having unlimited jurisdiction in all civil and criminal matters not within the jurisdiction of the Magistrates' Courts, and also hear appeals from Magistrates' Courts in civil and criminal matters. The Supreme Court is the highest Court in Israel, having jurisdiction as an appellate Court from the District Courts in all matters, both civil and criminal, and as a Court of first instance (sitting as a High Court of Justice) matters in which it considers it necessary to grant relief in the interests of justice and which are not within the jurisdiction of any other Court or Tribunal.

Appointees to the Supreme Court and other courts of Israel

Those qualified to be appointed to the Supreme Court – the repository of the finest judicial talent which we have – are the following:

1. a person who has held office as a judge of the District court for a period of *five years*;
2. a legal professional person, that is to say, one who is inscribed, or entitled to be inscribed, on the Roll of Advocates in Israel and who, continuously or intermittently, for not less than *ten years* – including at least five years in Israel – has been engaged in one or more of the following:
 - (a) the profession of an advocate;
 - (b) a judicial or other function in the service of the State of Israel or any other service approved for the purpose, by regulations, by the Minister of Justice;

- (c) the teaching of law at a University or High School of Law approved for that purpose, by regulation, by the Minister of Justice;
- 3. an eminent jurist.

The law expressly enables persons who have acquired part of their qualifications abroad, to be candidates for appointment to the Bench in Israel in order to facilitate the integration of immigrants with requisite qualifications. So far no appointment has been made of a person whose qualification is the teaching of laws. The last mentioned provision permits the appointment of distinguished and well known jurists even though they do not possess the ordinary qualifications, but no appointment has yet been made under that provision.

The pattern of Israeli law is extremely variegated – containing as it does, *inter alia*, elements of Jewish Religious Law as well as English and Continental Law – and this required at the top of the judicial hierarchy representatives of different schools so as to enable Israeli justice to benefit from what is best in each of them. I may note with gratification that the composition of Israel's Supreme Court, the judgments of which bind all the lower Courts, meets this requirement in a highly satisfactory manner.

Those qualified to be appointed to the District Court Bench are:

1. a person who has held office as a Magistrate for a period of four years;
2. a legal professional person as already defined who has engaged in his profession for not less than six years – including at least three years in Israel.

Lastly, an appointment to the position of Magistrate is open to a legal professional person, as defined, who has engaged in his profession for not less than three years – including at least one year in Israel.

The approximate average age of persons appointed to the Israeli Bench is 35 for Magistrates, 45 for District Court Judges, and 50 for Supreme Court Justices. The minimum age prescribed by law for an advocate in Israel is 23; but it is almost impossible to qualify as an advocate at that age, because the normal age at which a person completes his studies at a secondary school in Israel is eighteen. He then has to study for four years at the Law Faculty of the Hebrew University and must afterwards undergo a two years' period of law apprenticeship and pass the apprentices' examination in order to qualify as an advocate. In addition, if he is not exempt, he has to undergo two and a half years of military service. It follows, therefore, that normally a person is about 27

years of age when he becomes an advocate. If he wishes to obtain an appointment as a Magistrate, he must practice as an advocate for at least three years, by which time he will have already reached the age of thirty. It is not usual to appoint a Magistrate immediately after he has been in practice as an advocate only for the minimum period of three years prescribed by law, so that when persons are appointed as Magistrates they are usually about 35 years of age.

Financial provisions

The salary of a judge and the other payments to be made to him either during or after his term of office, including the payments to be made to his dependants after his death, and judges' pensions, are fixed by the Finance Committee of the *Knesset*, as are the salary and other payments to be made to the President of the State, members of the *Knesset* and the State Comptroller, and not in the manner prescribed for the payment of salary and other payments to State employees. The salary of the President of the Supreme Court is on a par with that of the Prime Minister, that of the other Justices of the Supreme Court on a par with that of the members of the Government, whilst the salaries of the other members of the Judiciary are fixed on a graduated scale accordingly, so that the salaries of the judges are among the highest in the country. This, too, is designed to ensure the independence of the Judiciary.

Restrictions on holding other offices

The Judges' Law imposes certain restrictions on judges as regards holding other offices, by providing that a judge shall not be a member of the *Knesset* or of the council of a local authority, but he may, with his own consent and the consent of the Minister of Justice, temporarily carry out another function on behalf of the State, or may carry out some other public function, if in his and the Minister's opinion, and in that of the President of the Supreme Court, it will not impair his status as a judge. Two Justices of the Supreme Court are Visiting Professors of the Law Faculty of the Hebrew University, Jerusalem, while other Justices of the Supreme Court and several District Court Judges are external teachers or teaching fellows of that Faculty.

Administration

It is evident that the work of a judge may be regulated not only by provisions of law, but also by administrative directions as to procedure, the places where the Courts sit, times of hearings, vacations and leave of absence, and so on. The Judges' Law has

therefore removed even these matters out of the hands of the executive power and has entrusted them to the Director of Courts – as I am called – who is a member of the Judiciary of the rank of a Relieving President who is appointed by the Minister of Justice and is responsible for all matters relating to the administration and organisation of the Courts. Furthermore, that law expressly provides that should the Minister of Justice find it necessary for administrative reasons to transfer a judge to a Court in another place he must obtain the prior consent of the President of the Supreme Court to such transfer.

The court of discipline

If I have left the subject of disciplinary procedure as to judges to the end, that certainly does not mean that – as a popular Hebrew saying has it – this last item is particularly dear to me. I do not even wish to convey that, though last, it is not least. On the contrary, my acquaintance with Israeli judges and their qualities and the experience gained since the enactment of the Judges' Law give me reason to believe that the relevant sections of the Judges' Law, which are detailed and comprehensive, will but very rarely have to be applied in practice.

Every judge is subject to the jurisdiction of a Court of Discipline, which may consist either of five members, including three Justices of the Supreme Court, or of three members, including two Justices of the Supreme Court, as the President of the Supreme Court may direct.

The members of the Court are chosen in each case by the Justices of the Supreme Court, of whom five constitute a quorum for that purpose. In the rare cases in which a Court had to be convened and in which incidentally the judge against whom the complaint was lodged was acquitted, there were five members constituting the Court of whom three were Supreme Court Justices, one a judge of the rank of the judge against whom the complaint was lodged, and one advocate.

A complaint against a judge may be submitted to the Court of Discipline by the Minister of Justice, and only by him, on one of the following grounds:

1. that the judge has acted improperly in carrying out his functions;
2. that the judge has behaved in a manner unbecoming to his status as a judge in Israel;
3. that the judge has been convicted of an offence which in the circumstances of the case involved moral turpitude;
4. that the Appointment Committee has found that the judge obtained his appointment unlawfully.

The Court of Discipline submits its findings – whether favourable or unfavourable – to the Minister of Justice. If it finds that a judge is not worthy to continue in the exercise of his functions, the Minister of Justice will bring that finding before the President of the State, who will remove the judge from office.

The provisions of the law regarding the qualifications, manner of appointment, term of office, salaries and other emoluments of the Judges of the Rabbinical Courts, known as *Dayanim*, and the Judges of the Moslem Religious Courts known as *Kadis*, follow closely those of the Judges' Law regarding the Civil Judiciary. Those provisions are contained in the Dayanim Law, 1955, and the Kadis Law, 1961, respectively.

The Rabbinical Courts, including the Rabbinical Court of Appeal, have exclusive jurisdiction in some matters of personal status of Jews in Israel, such as marriage and divorce, and concurrent jurisdiction with the Civil Courts in other matters of personal status of Jews in Israel such as maintenance, wills, legacies, succession and guardianship. The Moslem Religious Courts, including the Moslem Court of Appeal, have exclusive jurisdiction in all matters of personal status of Moslems who are not foreigners, and of Moslems who are foreigners, if, under the law of their nationality, they are subject in such matters to the jurisdiction of Moslem Religious Courts.

Independence of the judiciary is the major concern

I may briefly sum up by stating that we in Israel have not yet been persuaded that there is any need to change our present system and to provide a candidate for judicial office with any specific training for that function, or require him to pass a special examination. On the contrary, we are quite satisfied with the results of the present system, though I may mention in passing that we have, possibly in common with most of the modern world, found that we are under a necessity to specialise. More and more our individual judges are dealing solely with criminal or with civil cases, or even with special classes of cases. In particular, we have been appointing specialists in juvenile delinquency, income tax, traffic offences, municipal offences and other fields.

Our main concern however, has been to ensure the independence of our judges of the executive and other external influences by making special statutory provision to that end. I have tried to outline to you, to the best of my ability, the mode of appointment of Israeli judges and the special status they enjoy throughout their tenure. I may seem naive to you if I claim that our methods in regard to these matters are indeed well adapted to achieve our aims. It may be contended, perhaps rightly, that the fact that a

judge's promotion depends, on the votes of, *inter alia*, advocates and representatives of the executive power may cause judges – human nature being what it is – to try to favour them. But it is nevertheless clear that what ultimately determines the status of the judge in Israel is the fact of his fate being entrusted to a body consisting of representatives of different authorities, so that it is not the view of any individual – however distinguished – but the opinion of the body as such, as expressed by majority vote, that eventually prevails. This opinion is arrived at by free and full discussion. Where things are freely discussed, there will be no concealment of facts, and this is an effective safeguard for integrity of action. So it has been until now. Let us hope that it will so continue.

Y. EISENBERG *

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THE RIGHT OF ARRESTED PERSONS TO COMMUNICATE WITH THOSE WHOM IT IS NECESSARY FOR THEM TO CONSULT IN ORDER TO ENSURE THEIR DEFENCE OR TO PROTECT THEIR ESSENTIAL INTERESTS

REPORT OF THE INTERNATIONAL COMMISSION OF JURISTS.

INTRODUCTION

Aim and Scope of the Report

The aim of this Report² is to examine the content and scope of the right of persons accused of criminal offences to communicate with those with whom it is necessary for them to communicate in order to prepare their defence or to protect their interests. The rules which govern this right in a large number of legal systems have been studied so as to provide a background against which the basis of this right can be formulated. The legal systems studied have not been confined to those countries which have sent answers to the United Nations Questionnaire on the Right of Communication sent out by the International Commission of Jurists.

While taking note of the extent to which the right is recognized

¹ The Division of Human Rights of the United Nations requested the International Commission of Jurists to submit a Report on the Commission's views on this Right. The Commission accordingly sent out a United Nations questionnaire prepared in this connection to many countries and National Sections. Replies to the questionnaire were received from the following countries: Argentina, Australia, Bolivia, Ceylon, Chile, Colombia, Congo (Leopoldville), Costa Rica, El Salvador, France, Greece, Guatemala, Iran, Italy, Jamaica, Jordan, Lebanon, Mexico, Netherlands, Northern Rhodesia, Norway, Pakistan, Philippines, Senegal, South Africa, Southern Rhodesia, Sudan, Tunisia. The Commission is grateful to Mr. D. A. Thomas of the Law Department, London School of Economics and Political Science, and to Mr. Lucian G. Weeramantry, of the Commission's legal staff, for assistance in summarizing the large amount of material available. The views expressed in the article are those of the International Commission of Jurists.

² Report of the International Commission of Jurists to the Division of Human Rights of the United Nations. A summary of the Report appeared as document E/CN. 4/NBO/110 at the Nineteenth Session of the Commission on Human Rights, April 1963.

and the manner in which its recognition is given effect to in different countries when formulating the nature and scope of the right, the principles set out in the course of this Report under the various aspects of the right are essentially the minimum principles which the International Commission of Jurists considers should be given effect to by all countries that subscribe to the Rule of Law and are not necessarily principles common to all the legal systems studied. However, the Commission finds to its satisfaction that the right under study is substantially recognized in the legal systems prevailing in all the countries from which replies to the Questionnaire, which is reproduced in Annex A, were received.

The Report does not contain a discussion of the constitutional basis of the right of communication or the remedies available under different legal systems where the right is denied, as any adequate discussion of these two topics would necessarily involve an extension of the scope of the Report beyond the immediate topic of the right of communication to include accounts of the extent to which the right is recognized in various legal systems and the different methods of controlling the administration under these systems.

The Universal Declaration of Human Rights recognizes the right of every person to individual liberty (Article 3). Articles 9 and 11 recognize the right of freedom from arbitrary arrest and the right of freedom from arbitrary interference with a person's privacy, family, home or correspondence respectively, while Article 13 (1) declares that everyone has the right to freedom of movement and residence within the borders of each state.

Arrest and detention no doubt constitute restrictions on the right of personal freedom as conceived in the Universal Declaration of Human Rights. Although such restrictions have to be imposed by every state whenever the larger interests of the community demand it, it is most important that any restriction on this right should not be greater than is absolutely necessary in the circumstances. Any undue restriction would undoubtedly amount to a violation of the Rule of Law.

The International Commission of Jurists feels that quite apart from whether or not there exists a constitutional basis for the right of communication in any particular country, the Universal Declaration of Human Rights provides the necessary basis for the recognition of the right in its various aspects by all countries that profess to subscribe to the Rule of Law.

The scope of the Report is confined to the rights of persons detained in custody before conviction, and is not concerned with the rights of persons serving sentences of imprisonment imposed by a criminal court after conviction.

The Report deals with the right of communication under the following heads:

1. The Right of Communication during the Period of Police Custody;
2. The Right of Communication during the Period of Prison Custody;
3. *Mise au Secret*;
4. Detention under Emergency Legislation.

Differences in criminal procedures

It is necessary at the beginning to notice that differences in the rights available to arrested persons may be the results of differences in preliminary criminal procedure. In particular, there are two basic patterns of preliminary criminal procedure which may for convenience be described as the *English* and the *French* patterns.

From one point of view, the patterns are essentially the same. The accused will undergo a short period of police custody (*garde à vue*), between being arrested and being brought before the examining magistrate (*juge d'instruction*). From the time of his first appearance before the judicial officer he is in the custody of the prison authority, not the police (*détention préventive*). The major differences lie in the nature of the preliminary judicial enquiry and the function of the judicial officer. The right of communication will be examined at the stages of police custody (*garde à vue*) and prison custody (*détention préventive*). Differences resulting from the different natures of the preliminary judicial enquiry and the different functions of the judicial officer will be noticed where they are relevant.³

PART I

THE RIGHT OF COMMUNICATION DURING THE PERIOD OF POLICE CUSTODY

The first stage of both patterns of criminal procedure consists usually of a period of police custody prior to the first appearance of the arrested person before the examining magistrate. This period will normally be short and the maximum will often be fixed by law. In both patterns the police may still be collecting evidence, either by interrogation of the arrested person (although interrogation of the arrested person at this stage is severely restricted in most systems where the English pattern prevails by the operation of rules such as the English "Judges' Rules") or by such means as identification parades, medical examination of the arrested individual, discovery of property connected with the alleged offence in pursuance of statements made by him, or by the search of his person.

The needs of the arrested person at this stage are various. He may wish to notify his relatives of the fact of his arrest to avoid

³ The corresponding stages in the French pattern are indicated in this paragraph in brackets.

causing them anxiety over his disappearance or to arrange bail. He may also wish to consult his legal adviser⁴ to be correctly informed of his rights at this stage or to begin to collect evidence to be used in his defence at the eventual trial. He may desire the presence of his legal adviser or some other person during the interrogation or identification parade to ensure that he is not treated unfairly, that the interrogation or identification parade are conducted according to the prescribed rules of procedure, that witnesses claiming to be able to identify him are not provided with an opportunity of seeing him before the identification parade, that no pressure or undue influence is exercised on him to make a confession or other statement required by the interrogators and that generally no advantage is taken of the confused state of mind which may result from his arrest. He may wish to communicate with some person concerning urgent personal, business or family matters.

What minimum rights should an arrested person be entitled to in order to enable him to satisfy these needs? The extent and scope of his rights in this connection will now be considered under the following headings:

- A. Limitation of the Period of Police Custody;
- B. Notification of Relatives of the Fact of Arrest;
- C. Notification of the Fact of Arrest to the Legal Adviser, and Access to the Legal Adviser;
- D. Visits from Relatives and Friends;
- E. Communication with Other Persons on Matters relating to the Proceedings against the Arrested Person;
- F. Communications on Matters not Relevant to the Proceedings against the Arrested Person.

A. Limitation of the Period of Police Custody

In many countries the maximum period of police custody is fixed by law at twenty-four hours in normal circumstances; it may once be extended by the same length of time. In certain other systems the period of police custody can be extended beyond the normal maximum fixed by law if an enabling warrant to that effect is granted by the magistrate before whom the arrested person is produced. Such a warrant would be granted only upon good cause being shown and is itself limited in duration. Geographical difficulties and difficulties of transport may make it necessary in certain countries or regions to provide for a period of police detention somewhat longer than the desirable maximum.

The justification for police custody is normally the impossibility

⁴ The term "legal adviser" is used to include, in countries where two branches of the profession exist, barrister and solicitor or advocate and proctor as the case may be.

of producing the arrested person before a judicial officer immediately after his arrest. The interval between arrest and production is generally used for the collection of evidence. But while the collection of evidence by legitimate means is necessary for the investigation, the subjection by the police of the arrested person to duress, improper influence or torture in order to extract confessions is an infringement of the fundamental right of personal freedom and amounts to behaviour obnoxious to the Rule of Law. The arrested person should be safeguarded against the possibility of such behaviour by reducing the opportunities to a minimum.

In regard to the duration of police custody, the Rule of Law requires that the following minimum principles be observed:

1. The arrested person should be produced before a magistrate or other competent judicial officer with the least possible delay.

2. In any event the maximum period of police custody should be as short as possible and should be fixed by law. The maximum period may vary according to conditions in different countries, but in urban areas should not normally exceed twenty-four hours or forty-eight hours at weekends.

3. In general the arrested person should be remanded to the custody of the Prison Authority after his first appearance before the judicial officer, in order to prevent irregular interrogations by the police.

B. Notification of Relatives of the Fact of the Arrest

It has been suggested that one of the first needs of an arrested person is to notify his relatives e.g., his spouse, parents, brother or sister, of the fact that he has been arrested, in order to prevent anxiety caused by his sudden disappearance or to arrange bail. Many systems make no specific provision for the notification of the fact of arrest to the relatives of the arrested person during the period of police custody. This is not to say that in these systems the relatives of the arrested person are not notified of his arrest, but that the matter is left to the discretion of the police, who may permit the arrested person to notify his relatives, or notify them themselves, if they think fit. In such systems it is frequently the practice of the police to ensure that relatives are notified in some way or other, although there is no legal obligation to do so.

In a few systems, there are legally binding rules governing this question. For instance, in *Jordan* the Prison Ordinance provides that "All prisoners must be given every reasonable opportunity to exchange written communication with their friends..." The term "prisoners" in this Ordinance applies to all persons at all stages between arrest and conviction and this provision impliedly imposes a duty on the authority in whose custody the person is to inform

him of his right. In *Norway* the law provides that an arrested person may notify his closest relatives of his arrest and the place where he is in custody as soon as this is possible, and an obligation is placed upon the authorities to inform the arrested person's relatives of the arrest on their own initiative. In *Southern Rhodesia* the matter is regulated by Police Standing Orders, which provide that the arrested person may communicate with his friends if this can be done without prejudice to the investigation. Police Standing Orders in *New South Wales, Australia*, require the police to render every reasonable assistance to a person in custody to obtain bail, and clearly this would include notification of the fact of arrest to a close relative who might be able to act as a surety himself or to find some other person willing to do so.

It would appear that in many systems it is the general practice for the police to notify the relatives of the arrested person of his arrest if the arrested person requires them to do so even though the situation is not covered by a legal rule. Reasonable facilities for communication with relatives are also provided. There are some systems, however, in which facilities for communication with relatives are clearly inadequate. In *Congo (Léopoldville)* the relatives of the arrested person are often faced with the prospect of touring the police stations and prisons in an attempt to discover where the missing relative is. A similar situation prevails in *Tunisia*.

In relation to the transfer of the arrested person from one place of custody to another, the situation in most systems appears to be similar. The legal right of an arrested person to notify his relatives does not appear generally to extend to a transfer from one place of custody to another, but it is the practice of the authorities to notify the relatives, or to permit the arrested person to notify them.

To sum up, the position in relation to the right of the arrested person to communicate the fact of his arrest and the place of custody appears to follow the same pattern in most systems. There is, with the exception of a few countries, no legal right to communicate with relatives and no legal obligation on the authorities to notify relatives. Communications with relatives is normally permitted within reasonable limits, and the authorities may notify the relatives either at the request of the arrested person or on their own initiative. There is nothing to prevent the authorities from notifying a relative or other person of the arrest against the wishes of the arrested person. The notification may be by any means which is convenient, but the arrested person has no legal right to demand that a particular means be used. The arrested person is not normally informed of the right to notify his relatives unless he requests that they be notified.

This position is not entirely satisfactory. If it is a general practice to permit the arrested person to notify his relatives of the fact

of his arrest, there can be no objection to the formulation of a legal rule entitling the arrested person to notify them. In certain cases notification of the arrest to the arrested person's relatives may embarrass the police in their enquiries if, for instance, the relatives are themselves involved in the crime for which the person has been arrested, or if they are in a position to destroy or conceal important evidence. Specific exceptions could be made to deal with these situations. The police authority should be under an obligation to inform the arrested person of his right as soon as is possible after his arrest, for if the right exists, the arrested person should naturally be informed of his right. The right should also extend to the communication of the transfer of an arrested person from one place of custody to another. However commendable the existing practices in most countries may be, the Rule of Law demands that the right of an arrested person to notify his relatives of the fact of his arrest and of the place where he is being kept in custody should be given legal recognition.

In the view of the Commission, the Rule of Law requires that the following minimum principles be observed in connection with the right of an arrested person to notify his relatives of the fact of his arrest and the place of custody:

1. The arrested person should have the legal right to notify those relatives or other persons with whom he is living, and those relatives or other persons whose assistance may be necessary for the purpose of obtaining the services of a legal adviser or of obtaining bail, of the fact of his arrest and the place of custody.

2. The arrested person should be entitled to exercise this right as soon as is reasonably possible after his arrest.

3. A legal duty should be imposed on the police authority to inform the arrested person of this right, and to provide reasonable facilities for its exercise.

4. In the case of a juvenile or a person unable to make the notification himself, there should be an obligation on the police authority to notify the relatives.

5. In any case where notification of the arrest is likely to lead directly or indirectly to the escape of a suspected party to the crime not yet in custody, or to the destruction or concealment of evidence relevant to the offence for which the person has been arrested or of which he is suspected, or where it will in any other way seriously prejudice the investigation of the offence, the right of notification may be suspended until the appearance of the arrested person before the judicial officer, or until the reason for the suspension has been removed, whichever is the sooner.

6. Any communication between an arrested person and his relatives or friends may, if necessary, be confined to the fact of arrest, the nature of the offence with which he has been charged or

of which he is suspected, the place of custody, and a request for assistance in obtaining legal advice or bail.

7. The same rules that relate to communication of the fact of arrest should apply to communication of the fact of transfer from one place of custody to another.

C. Notification of the Fact of Arrest to the Legal Adviser, and Access to the Legal Adviser

There are a number of reasons why an arrested person may wish to communicate with his legal advisers during the period of police custody. He may require assistance in obtaining bail; he may need advice as to his right to refuse to submit to interrogation (where he has such a right) or on other rights he may have during the period of police custody; he may have special representations to make to the police regarding his arrest or regarding the justification for it through his legal adviser; he may wish to instruct his legal adviser concerning the preparation of his defence; he may require his adviser to be present at an identification parade in order to ensure that it is properly conducted; there may be cases where a piece of evidence vital to the defence may be lost unless the arrested person is able to instruct his legal adviser to take action immediately. Does the right to communicate with the legal adviser sufficiently provide for these needs? ⁵

The position in many systems in relation to communication with the legal adviser during the period of police custody is not very different from that in relation to notifying the relatives of the arrest – there is often no specific provision on the topic, and the matter is left to police discretion. The administration of legal aid services in the systems studied is beyond the scope of this Report, but it is worth noticing that in most systems legal aid at public expense is available only after the appearance of the arrested person before the examining magistrate. A discussion of the right of the arrested person to communicate with his legal adviser between the time of his arrest and of his being produced before a magistrate is thus relevant to a very small proportion of arrested persons who have a legal adviser at the time of the arrest. In this connection it is interesting to note that in *Mexico* the Constitution itself gives an arrested person the right to nominate a legal adviser immediately upon arrest [Article 20 (IX)].

A specific right to notify the arrested person's legal adviser of the arrest and place of custody is found in rather more systems than is a legal right to notify relatives. However, in most countries where

⁵ In most systems where a *legal* right to communicate with the legal adviser exists, the right is defined in terms sufficiently wide to cover all these situations, e.g., in the Philippines, Pakistan, Jamaica and South Africa.

this specific right is not legally recognized, the arrested person is normally permitted to communicate with his legal advisers after arrest notwithstanding the absence of the legal right. Yet there are countries where the matter is left entirely to the discretion of the police and this discretion is not always properly exercised.

The value of the right to communicate with the legal adviser during the period of police custody may depend on the privacy of the communications. On the other hand, security may require that the arrested person be kept under supervision during the interview to escape from custody or disposing of things which may enable him to escape from custody or disposing of things which may be evidence against him. A practical solution to this problem has been found in many countries where there is provision for a police officer to be present at interviews between the arrested person and his legal adviser, able to see the participants but unable to overhear their conversation.

In countries where the right of communication with a legal adviser is limited to communication in writing, for example, in *Jordan*, the position is unsatisfactory. The problem in such countries is rendered more acute by reason of the fact that where censorship is necessary on security grounds this deprives the communications of all privacy.

A further reason which should be noted why an arrested person may require access to his legal adviser is that the presence of an adviser at an interrogation or identification parade is a check on possible unfair treatment of the arrested person. The practice of permitting a legal adviser to be present at an identification parade is followed in more countries than is the practice of permitting a legal adviser to be present during a police interrogation. This observation as to the practice would apply equally to the right of a legal adviser to be present.

Whether it is desirable to permit a legal adviser to be present during police investigations is debatable. On the one hand, the presence of a legal adviser, or where a legal adviser is not available, of a friend or relative during the interrogations is clearly a valuable safeguard to an arrested person. On the other hand, it may well hamper the police unduly in the legitimate exercise of their powers. In the case of juveniles, however, it is arguable that the presence of a parent or guardian is desirable during police interrogations. The Police Standing Orders in *New South Wales, Australia*, for instance, require that, where practicable, any interrogation of a juvenile should be carried out in the presence of a parent or guardian.

There can be little objection to the presence of a legal adviser or friend at an identification parade. In fact, the right to have a legal adviser or friend present at an identification parade is a right which in the view of the Commission should be enjoyed by every arrested

person, because the denial of this right is capable of leading to several abuses. For instance, the rules of procedure prescribed for the conduct of identification parades may be departed from by the police to the prejudice of the arrested person and witnesses may even be afforded an opportunity of seeing the arrested person before the parade at which they are asked to identify him. The presence of a lawyer or a selected friend will also enable the arrested person to point out to the magistrate and to have recorded in time any objections which he may have to the manner in which the parade was conducted.

The general pattern seems to be that the right of communication with a legal adviser during the period of police custody is either a legally recognised right or depends on police practice. The arrested person is generally allowed to converse with his adviser in private, unless the exigencies of internal or external security require otherwise. It is unusual for the legal adviser to be present during police interrogations or other similar investigations. It is more usual for the adviser to be present at identification parades.

In the view of the Commission, the Rule of Law requires that the following minimum principles be observed in connection with the right of the arrested person to communicate with his legal adviser:

1. The arrested person should have a legal right to communicate orally with his legal adviser.
2. It should be the duty of the police to inform the arrested person without any delay of his right in this regard.
3. The arrested person should be entitled to exercise this right as soon as is practicable after the arrest.
4. The interview should be private and should not be overheard by the police under any circumstances.
5. Where, however, there is reason to fear an attempt to escape or to transfer possession of an article which might facilitate an escape or which might be evidence against the arrested person, a police officer may be permitted to be present at the interview within sight but out of hearing.
6. The arrested person should be entitled to see his legal adviser at all reasonable times and as frequently as he wishes to.
7. The arrested person should be entitled to have a legal adviser or a friend present to protect his interests at any identification parade held at the instance of the police relating to him.

D. Visits from Relatives and Friends

The right of an arrested person to notify his relatives and friends of the fact of his arrest has been considered above. The right of an arrested person to receive visits from them will now be discussed.

In many cases the arrested person will not suffer unduly if he

is prevented from receiving visits from his relatives and friends, as the period of police custody is normally short. The relatives will not be anxious over his sudden disappearance if they are notified of the arrest. However, it may be necessary for the arrested person to receive visits from them, particularly if he has no legal adviser, in connection with the proceedings against him. They may be able to assist in arranging bail or in providing a legal adviser, and it may often be necessary for them to visit the arrested person for this purpose. Quite apart from these considerations, it may be desirable to allow the arrested person to receive visits on humanitarian grounds, to preserve the morale both of the arrested person and of his relatives and friends. However, it would not be unjust to deprive the arrested person of such visits in the proper interests of the investigation where this can be done without prejudicing the arrested person's defence or his chances of obtaining bail.

The information available on this topic suggests that the situation in several systems is that the arrested person may receive visits from friends and relatives if this can be done without prejudice to the investigation. This right is usually subject to the discretion of the police officer in charge of the investigation, and the visits are generally supervised. Visits are limited to what is reasonable in the circumstances, but restrictions are not generally imposed as a form of punishment. In order to exercise control over indiscriminate applications for visits, the practice is followed in many countries of requiring the visitor to state in writing the purpose of his visit before permission for the visit is granted. Although *bona fide* applications for visits are generally allowed, many countries restrict visits where it is felt that it is in the interests of the investigation or of the security and good order of the place of custody to do so. Visits are normally subject to such supervision as is necessary in the circumstances. It must be pointed out, however, that in *France* the police practice is not to permit visits at this stage. This may be due to the procedural differences in interrogation and investigation. The French practice is followed in certain other countries where the French system obtains.

The practices in most countries relating to visits from relatives and friends can generally be considered to be satisfactory, though improvement in certain respects can be achieved. The Commission, however, considers it necessary that such existing practices as are satisfactory and desirable be formulated in legally binding rules. In doing so, particular attention must be given to the needs of an arrested person who is attempting to arrange bail or to procure the services of a legal adviser. The observance of the following minimum principles is required in this context:

1. An arrested person should have the right to receive visits from close relations during the period of police custody. This right

will of course be subject to the limitations referred to under (2) below.

2. The police officer concerned may refuse a visit if he has reason to believe that the visit may prejudice the investigation or facilitate the escape of the arrested person or be detrimental to the security and good order of the place of custody. Where there are an unusually large number of applications for visits, the police officer concerned may be permitted in his discretion to regulate the number of visits allowed.

3. All visits may be subject to such supervision as the police officer considers necessary in the circumstances.

4. Permission for visits should not be refused whenever the officer concerned is satisfied that the visit is necessary for the purpose of arranging bail or for obtaining legal representation for the arrested person.

E. Communication with Other Persons on Matters Relating to the Proceedings Against the Arrested Person

The right of an arrested person to communicate with his legal adviser during the period of police custody is based on needs arising out of the criminal proceedings in which he finds himself involved. Certain other persons fall into a similar category – the arrested person may need to communicate with a possible surety for bail, his medical practitioner, or, in the case of a foreign citizen, his consul.

With regard to consuls, the general practice appears to be to permit full communication between the arrested person and the consular representative. With regard to medical advisers, an arrested person should be entitled to receive a visit from him or, where the advice can be obtained by communication, to communicate with him. He should also be entitled to receive visits from possible sureties.

In regard to an arrested person's rights under this head, it is considered that the following minimum principles should be legally recognised:

1. An arrested person should be entitled to communicate with and receive visits from his medical adviser whenever such communication or visit is necessary in relation to the proceedings against him.

2. In the case of a foreign citizen, the arrested person should be granted all reasonable facilities for interviews with his consul and such interviews should take place out of the hearing of a police officer unless the interests of internal or external security demand that any such interview take place within police hearing.

3. The arrested person should be entitled to receive visits from possible sureties.

4. Principles 1-5 above under (C) above applicable to communication and access to legal advisers should, subject to (1) and (2) above, be applicable to consuls and medical advisers.

F. Communications on Matters not Relevant to the Proceedings against the Arrested Person

One of the consequences of an arrest is the sudden interruption of the business in which the arrested person was engaged at the time. He may be prevented from attending at his place of employment, or from carrying out the instructions of his employer in some matter; his business, in the case of a self-employed man, may cease to operate; urgent personal or family affairs may be adversely affected. The arrest of an innocent man may thus cause considerable damage to his interests - he may lose his employment, his business may decline or permanent harm may be suffered by his family. Such damage is inevitable, and must be balanced against the advantage to the public of the efficient prosecution of offenders. It may, however, be mitigated to some degree if the arrested person is allowed to communicate with various persons in relation to the matters in question - to notify his employer of the reason for his absence, or to procure a substitute to carry on his business.

In some countries no rules exist governing the right of an arrested person to communicate on matters not relevant to the proceedings against him but nevertheless vital to his personal or professional interests. However, permission to communicate on such matters is often granted in the discretion of the officer in charge of the place of custody or a more senior officer. Communication with friends on such matters is normally allowed by letter or telephone, but in most systems that permit such communications the letters are subject to police censorship and telephone conversations are within the hearing of the police. Generally speaking, the practice in most systems appears to be liberal in respect of communications of the type referred to here.

It is considered that the following minimum principles should govern the right of an arrested person to communicate with others on matters not connected with the proceedings against him:

1. The arrested person should enjoy the right to make communications either directly or indirectly through his legal adviser or relatives on urgent matters concerning his employment, business or family affairs. Reasonable facilities should be afforded to the arrested person for such communications.

2. This right may be restricted either entirely or in part at the discretion of the police officer in charge of the arrested person if he

has reason to believe that such communications would prejudice the investigation.

3. All such communications may be subjected to censorship by the police authority. Oral communications may be required to take place in the hearing of a police officer.

PART II

THE RIGHT OF COMMUNICATION DURING THE PERIOD OF PRISON CUSTODY

The second stage of preliminary criminal proceedings in both the English and French systems consists of a judicial investigation of the charges against the arrested person. Although the nature of the judicial investigation is different, in both patterns the arrested person will normally be removed from the custody of the police and placed in the custody of the prison authority. He has a recognised legal status as an "unconvicted prisoner" or *inculpé*, and his rights are defined with greater precision. The need to communicate now assumes a greater importance. This stage will always be of much longer duration – seldom less than several weeks even in the most speedy system – and as the time of the trial approaches the need to prepare a defence becomes more urgent.

The right to communication at this stage will be analysed under the following headings:

- A. Access to the Legal Adviser;
- B. Access to Other Persons in Connection with Matters relevant to the Proceedings;
- C. Visits from Family and Friends;
- D. Communication by Letter with Family and Friends;
- E. Access to Ministers of Religion;
- F. Communication with and Visits from Medical Advisers.

No account will be taken in this part of the provisions of emergency legislation.

A. Access to the Legal Adviser ⁶

In the vast majority of systems, the unconvicted prisoner has a legal right of access to his legal adviser during the whole period of prison custody, either by visits from the adviser or other means. This right is often not subject to restrictions of any kind. The rules regulating the right are generally found in the rules governing the administration of prisons. The scope of the right will now be considered in detail.

The rights of unconvicted prisoners under this head in the *English* and *French* systems can be seen on an examination of the

⁶ See Note 4 above.

English and French Prison Rules, particularly as the countries which follow the English pattern have rules closely following those in England and the countries which follow the French pattern have rules closely following those in France.

The Prison Rules in force in *England* provide that reasonable facilities shall be allowed for the legal adviser of a prisoner who is a party to legal proceedings to interview the prisoner in the sight but not in the hearing of a prison officer. Any interview between the prisoner and the legal adviser on matters other than the proceedings in which the prisoner is involved must take place in the hearing of an officer. These visits are not limited in number, and may not be restricted as a disciplinary measure. The rules also require that an unconvicted prisoner be allowed all reasonable facilities, including the provision of writing materials for conducting correspondence or preparing notes in connection with his defence. A confidential written communication prepared as instructions for the legal adviser of an untried prisoner may be delivered personally to the legal adviser and is not subject to censorship, unless the governor of the prison has reason to suppose that it contains matter not relating to such instructions. This right also may not be restricted as a disciplinary measure.

In *France* the unconvicted prisoner may be visited by his legal adviser every day at the times fixed by the prison administration (in consultation with the *bâtonnier de l'Ordre des avocats*) and in urgent cases at other times. The right to receive such visits is not restricted in any case, whether the prisoner is subjected to a disciplinary measure, or to *mise au secret*. The visit takes place in private without supervision. The prisoner may correspond with his adviser, and this right is not subject to restriction either as a disciplinary measure or by reason of *mise au secret*. Letters between the prisoner and his adviser are not subject to censorship, provided that they are clearly and unambiguously marked as such on the envelope. Writing materials are available, and letters are forwarded by the prison authority at the prisoner's expense.

All the systems studied admit the right of the prisoner to communicate with his legal adviser. The differences concern the degree of privacy permitted in the case of an interview, the extent to which letters are subject to censorship, and the circumstances in which the right may be restricted.

It is considered that the Rule of Law requires that the following minimum principles should apply to the right of access to the legal adviser:

1. The legal adviser should have the right to interview and visit the prisoner at any reasonable time and on any number of occasions, and the prisoner shall be entitled to receive such visits.
2. Such interviews should take place in private, or, if necessary

for security, in the sight but not the hearing of a prison officer.

3. This right should not be subject to forfeiture as a disciplinary measure or for any other reason.

4. In the event of misconduct by the legal adviser, further interviews should be subject to such supervision as is necessary.

5. The prisoner should have the right to send and receive letters to and from his legal adviser as frequently as he desires. Stationery and other facilities should be provided if necessary.

6. Letters between the prisoner and his legal adviser on matters relating to the proceedings against the prisoner should not be examined by the prison authority or the judicial officer unless there is good reason to believe that they contain references to matters other than the proceedings against the prisoner.

7. This right should not be subject to forfeiture as a disciplinary measure or otherwise.

B. Access to Other Persons in Connection with Matters Relevant to the Proceedings

An unconvicted prisoner may wish to have access to various persons in addition to his legal adviser in connection with the proceedings against him. He may wish to obtain advice from his consul, if he is a foreign national, or to be examined by his own medical practitioner in order to obtain evidence concerning his state of mind or health at the time of the alleged offence. The right of the unconvicted prisoner to interview his consul, or to be examined by his doctor, will be considered now.

In a few countries, such as *Norway* and *Ceylon*, the prison rules specially provide for the right of an unconvicted alien to have communication with the consular representative of his country. Most systems, however, appear to be silent on the question of special facilities for visits by consular officers, but there is generally a discretionary power either with the prison authority or the *juge d'instruction* to permit visits in exceptional cases, and this power may well be exercised in the case of a consular officer wishing to visit an alien prisoner.

We are not here concerned with visits to prisoners by the medical practitioner employed by the prison authority, whose duty it is to attend to prisoners who are taken ill while in prison, but with visits from a medical officer selected by the prisoner, his friends or his legal adviser with a view to examination of the prisoner for the purpose of his defence. The position relating to such visits in most systems is scarcely more specific than the position relating to visits by a consular representative. In a few countries, such as *England*, the rules permit a prisoner to receive such visits from a medical practitioner, but most systems are silent on the subject.

It is considered that the Rule of Law requires that the right of unconvicted prisoners to receive visits by consular officers and medical practitioners for the purpose of the proceedings against the prisoner should be specifically recognized and regulated by law, and that generally both the consular officer and the prisoner's medical adviser should be given the same right of access as the prisoner's legal adviser.

C. Visits from Family and Friends

Facilities for visits to the unconvicted prisoner by his relatives and friends are generally subject to a greater degree of restriction than are visits by his legal adviser. In certain systems the judicial officer may order the prisoner to be subjected to *mise au secret*, a state in which visits by relatives or friends are not permitted at all. The scope of *mise au secret* in those systems where it exists will be discussed later. We are here concerned with the rules governing visits to prisoners who are not subject to this regime.

In regard to visits from family and friends, the difference between the two patterns of preliminary criminal procedure, namely the *English* and *French* pattern, has a marked effect on the right of the unconvicted prisoner to receive such visits. In systems where the *English* pattern is followed, the rights of the prisoner are generally established in prison regulations and are usually subject to restrictions only as a consequence of an offence against prison discipline. Neither the examining magistrate nor the prosecuting authority has any control over the visits received by the prisoner. Under the *French* pattern the prisoner's right to receive visits is subject to the discretion of the *juge d'instruction* or other judicial officer, who may prohibit visits in the interests of the investigation. It will therefore be convenient to consider the minimum appropriate rights of an unconvicted prisoner to receive visits from friends and relatives separately, according to whether the English or the French pattern is adopted.

It is not proposed to set out here in detail the prison rules in force in different countries. However, some idea of the differences between the English and French systems will be brought out from the following short summaries of the prison rules obtaining in England and in France.

The prison rules in force in *England* provide that the prisoner may receive visits during such hours and under such restrictions as the prison authority determines. In practice, the prisoner may be visited daily during the hours fixed for the particular prison, and in urgent cases at other times. All such visits take place in the sight and hearing of a prison officer. The right to receive visits may be forfeited as a disciplinary measure, unless they are visits

required for the purpose of securing bail or preparing a defence. The prisoner has a right to have an interview at any reasonable hour on a weekday for the purpose of providing bail. This right is not subject to forfeiture.

In *France*, the right to visit the unconvicted prisoner is subject to the control of the *juge d'instruction* or other judicial officer in charge of the investigation. Permission may not be refused to the prisoner's spouse, close relatives or guardian, save in exceptional circumstances. Other persons are not normally permitted to visit unless the competent authority considers there are special reasons. Visits are allowed at least three times a week. Restrictions may be imposed by the *juge d'instruction*, who may withdraw his permission for particular visitors, or order *mise au secret*. Restrictions on visits may also result from disciplinary action taken by the prison authority. The time and duration of the visit depend on the regulations in force in the particular prison, and the visit takes place in the sight and hearing of a prison official, who may terminate the interview if necessary.

It is considered that the Rule of Law requires that the following minimum legal principles be recognized in a system based on *English* procedure:

1. The prisoner should be entitled to receive visits from relatives and friends during visiting hours.
2. The number of visiting days and the duration of the visits should be adequate and reasonable.
3. Special facilities should be made available to a prisoner who requires to interview a relation or friend with a view to arranging bail. Such an interview should be permitted on any day at any reasonable time.
4. Visits should not be forfeited on disciplinary grounds except in extreme cases.
5. Visits may be required to take place in the sight and hearing of a prison officer.
6. Proper facilities for visits should be available in every prison.
7. A visitor who infringes a prison regulation may be denied permission to make further visits.
8. Visits should not be prohibited on the ground of the visitor's bad character or previous criminal record, unless there is good reason to believe that the visit, if allowed, would seriously affect the security or good order of the prison, or lead to the destruction of evidence or interference with witnesses.

The following minimum legal principles are appropriate to a system based on *French* procedure:

1. Any person authorised by the *juge d'instruction* should

be permitted to visit the prisoner during visiting hours which shall be adequate.

2. The *juge d'instruction* should not refuse permission to visit to a relative of a prisoner unless there are special reasons for doing so.

3. The *juge d'instruction* may authorise a visit at any time in exceptional circumstances.

4, 5, 6 and 7. The suggested principles 4-7 applicable to the English pattern should apply to the French pattern also.

8. *Mise au secret*. The question of *mise au secret* will be discussed in Part 3 below.

9. Visits should be of reasonable duration.

D. Communication by Letter with Family and Friends

The right of the unconvicted prisoner to correspond with his family and friends by letter is usually subject to restrictions similar in effect to those which apply to visits by his family and friends.

Here again the differences between the *English* and *French* patterns as well as the similarities in these two patterns will be brought out by an examination of the prison rules relating to communication by letter with family or friends in England and in France.

In *England* the prison authority is required to allow the prisoner all reasonable facilities for communicating by letter with his relatives and friends. This includes the provision of writing materials. All letters to or from a prisoner are read by a prison officer, and may be stopped if the contents are objectionable or if the letter is of inordinate length. The right to send or receive letters may be forfeited as punishment for an offence against prison discipline, except in so far as any letters may be necessary for securing bail or preparing a defence.

In *France* the right to correspond by letter is subject to the restrictions similar to those relating to the right to receive visits. The prisoner may write to anyone he chooses on any day of the week, unless the judicial officer in charge of the investigation orders *mise au secret* or the prisoner is subjected to disciplinary measures. All letters are subject to censorship, which is normally delegated by the judicial officer to the prison authority, who is required to inform the judicial officer of anything abnormal. Letters must be written clearly, and must be confined to matters affecting the correspondents personally. Letters in languages other than French must be translated before being sent on, and for this reason their frequency and length may be restricted. Letters which infringe the regulations are retained, but there is no obligation on the authorities

to notify the prisoner of this fact. Writing materials are available and letters are sent at the expense of the prisoner.

The right of the unconvicted prisoner to correspond with his family and friends is generally recognized, but it is considered that the following minimum legal principles should apply to the right:

1. The unconvicted prisoner should have a legal right to communicate with his relatives and friends by letter as often as is reasonably possible by writing letters to anyone he chooses and receiving any letters sent to him.

2. All necessary facilities should be available and be provided free of charge if the prisoner is unable to pay for them.

3. All letters written by or intended for the prisoner may be examined before being delivered.

4. Letters should not be intercepted unless they are likely to affect the proceedings against the prisoner in an improper manner, or to prejudice the good order and security of the prison.

5. Where any letter written to the prisoner is intercepted, the prisoner should be informed of this fact and the letter should be returned to the sender.

6. The right to communicate by letter should not be restricted as a disciplinary measure except in extreme cases.

7. In systems where the French pattern of procedure has been adopted, intercepted letters may be passed to the judicial officer in charge of the investigation.

8. *Mise au secret*. This topic will be considered in Part 3.

E. Access to Ministers of Religion

During the period of prison custody the unconvicted prisoner may wish to see his minister of religion in order to participate in the rites of his religion or to obtain help and advice.

In perhaps every developed system, provision is made for visits by ministers of religion and in many countries there are prison chaplains appointed by the prison authorities to minister to the needs of prisoners belonging to their religion or religious denomination. These prison chaplains would often be representative of the more common religious faiths in the particular country. Prisoners of other faiths could request the prison authority to arrange visits from ministers or priests of those faiths and the prison authority must make this arrangement if it is possible. While in some countries the right to receive visits from ministers of religion is controlled by regulations, in other countries, such as *Norway*, the prisoner has an uncontrolled right to such visits, the visits taking place in private. In *Greece* priests are obliged to visit all prisoners, even those subjected to *mise au secret*.

The Rule of Law requires that unconvicted prisoners shall not

be hindered in the receiving of religious assistance from ministers or priests of their particular religion. Their right, therefore, to receive visits from ministers or priests of their particular religion should be recognized by law.

F. Communications with and Visits from Medical Advisers ⁷

The right to communicate with and to receive visits from medical advisers in the case of unconvicted prisoners should not be different from the right of arrested persons in this regard, subject of course to the fact that visits from medical advisers to unconvicted prisoners will not be considered necessary so often as such visits to arrested persons in police custody for the reason that most prisons have a prison hospital and medical officers attached to it, who are capable of attending to the ordinary medical needs of prisoners. In *Argentina*, for example, an unconvicted prisoner may receive a visit from his own doctor whenever such a visit is medically advisable and the prisoner can arrange to pay the fees involved.

In the case of unconvicted prisoners, communication and visits should be considered necessary whenever the medical officers attached to the prison are not in a position to attend to a particular case because of its unusual complexity or otherwise.

PART III

MISE AU SECRET

The idea that a prisoner should be subjected during the preliminary judicial enquiry to a state in which his right of communication is severely restricted in the interests of the investigation is mostly found in those legal systems which have adopted the *French* type of criminal procedure. The different nature of *English* criminal proceedings and the different position of the inquiring magistrate prevent the acceptance of such an idea in a system based on the *English* pattern. In the *French* pattern, which involves a procedure basically inquisitorial and a judicial officer who closely supervises the investigation, a system of *mise au secret* finds a place.

The observations and recommendations which follow will be confined to *mise au secret* at the stage of the judicial inquiry in normal criminal proceedings. No account will be taken of the de facto *mise au secret* which police officers are in a position to impose

⁷ The communications and visits contemplated under this head do not refer to medical communications and visits made for the purpose of preparing the prisoner's defence. The latter have already been dealt with under Part II(B) above.

in most systems during the short period of police custody before the first appearance of the prisoner before the judicial officer, or of the position of a person detained under emergency legislation.

In *France* the prisoner may be subjected to *mise au secret* by order of the *juge d'instruction* for a period of ten days, which may be renewed once. The maximum period is twenty days. The *juge d'instruction* may remove the restriction at any time. No precise conditions precedent for *mise au secret* are laid down, but in practice it is not ordered unless it is urgently necessary to prevent the destruction of evidence, the escape of suspects, or collusion between accomplices. The decision to impose *mise au secret* may be made by the *juge d'instruction* without consulting the accused or his legal adviser, and is not subject to appeal. The decision need not be communicated to the accused, who may learn of it only through its effects.

The effect of the order will be to subject the prisoner to solitary confinement in a cell, and to prohibit visits by anyone except his legal adviser, prison officers, the prison doctor, almoner and social worker. Visits by the visiting magistrates are forbidden. Communication by other means with other persons is also prohibited. If the prisoner becomes seriously ill, or is the victim of an accident, his family is immediately informed, and he is informed of any similar misfortune to any member of his family.

Mise au secret may be ordered and removed only by the *juge d'instruction*.⁸ It must be added that in practice the ordering of *mise au secret* is rare in *France*.

It will be useful to examine the legal rules and the practices in some of the countries where *mise au secret* is a recognized method of imprisonment before attempting to formulate general principles of the Rule of Law relating to this mode of imprisonment. This approach is considered necessary in view of the many differences that one finds in such legal rules and practices.

In *Senegal* the pattern is similar to that obtaining in *France*. *Mise au secret* may be ordered by the *juge d'instruction* for a period of ten days and may be renewed once for the same period. The order must be recorded on the prison register and reported to the *Procureur Général*. The *juge d'instruction* may prohibit communications between accomplices for longer periods. No precise conditions precedent are laid down, but it is used only where it is indispensable to the discovery of the truth. There is no obligation to give a hearing to the prisoner or his legal adviser before *mise au secret* is ordered. The decision is not subject to appeal.

⁸ Inasmuch as it is only the *juge d'instruction* who can order or remove it, *mise au secret* is not applicable to persons arrested *en flagrant délit* and brought directly to Court for trial.

The order does not affect the prisoner's legal adviser, nor the doctor, dentist, almoner or director or other officer of the prison, or the visiting magistrates. The order in effect prohibits all communication between the prisoner and his relatives and friends, and anyone detained as an accomplice. *Mise au secret* may be removed by the *juge d'instruction*, and ceases automatically if the prisoner becomes gravely ill and is removed to hospital.

In *Lebanon* the *juge d'instruction* may order *mise au secret* at any time after the first appearance of the prisoner. Conditions precedent are not specified but it is used only to prevent destruction of evidence, escape of suspects, interference with witnesses and similar obstructions to the inquiry. The prisoner and his legal adviser have no right to be heard before the decision is made. The decision is recorded in writing and communicated to the prisoner when it takes effect. The decision is not subject to appeal.

The effect of the decision is to prohibit visits to the prisoner by anyone except his legal adviser, doctors, dentists, the almoner, prison officers and visiting magistrates. No restriction is placed on written communications which remain subject only to censorship. *Mise au secret* may be terminated by order of the *juge d'instruction* who ordered it.

The *Criminal Procedure Code* of *Chile* provides that when a person is arrested and subjected to *mise au secret* he may have a meeting with his legal adviser to discuss matters relating to the termination of the *incommunicado*.⁹ This meeting shall be in the presence of the *juge d'instruction*.

In the *Republic of Congo (Leopoldville)* the prisoner may be subjected to *mise au secret* by order of the *ministère public* for a period of five days. The period may be extended by order of the judge for periods of a month at a time. There is no maximum period. The decision of the judge is subject to appeal by the prisoner or by the *ministère public*.

In *Costa Rica* *mise au secret* may be ordered by the *juge d'instruction* or the functionary in charge of the summary inquiry for a maximum period of ten days. This period may be once extended for a further ten days by the *juge d'instruction* only. The *juge d'instruction* is obliged to visit the prisoner at least every other day.

In *Iran* the prisoner may be placed under *mise au secret* by the *juge d'instruction* in the interests of the investigation for an indefinite period. The matter is not regulated by law.

In *Tunisia* *mise au secret* is ordered by the *juge d'instruction*, although it is not recognised by law.

In *Greece* the prisoner may be subjected to *mise au secret* at any time after his appearance before the *juge d'instruction*, by order

⁹ The Spanish equivalent of *mise au secret*.

of the *juge d'instruction* on the application of the prosecutor. No hearing need be afforded to the accused or his legal adviser before the decision is made. The decision is recorded in writing with reasons, but the prisoner need not be informed of the decision and may learn of it only when it begins to take effect. An appeal from the decision lies to the *Chambre Correctionnelle*. The extent of the restrictions imposed are determined by the *juge d'instruction*, but they cannot affect the legal adviser. The maximum period of *mise au secret* is not fixed, but it may be terminated by the *juge d'instruction* who ordered it.

In *Norway* restrictions on the prisoner's right to communication may be imposed by the prison authority or the court on their own initiative or on the application of the prosecuting authority. No hearing is afforded to the prisoner or his counsel before the decision is made. The prisoner must be informed of the decision. No restrictions may be imposed on the right of the prisoner to see his legal adviser, medical practitioner, minister of religion and, in the case of an alien, consular officer. The prisoner may also be visited by officials of the prosecuting authority. The prisoner may receive information concerning his family or business if this does not prejudice the investigation, and his relatives are notified if he is taken seriously ill, suffers an injury, or is transferred to another place of custody. There is no maximum period for the restrictions, which may be lifted by the authority which imposed them. A decision made by the prison authority is subject to an appeal to the Directorate of Prisons, and a decision of the court to an appeal to a superior court. The decision will not be reviewed unless it is challenged by or on behalf of the prisoner.

In *Jordan* the public prosecutor may by order prohibit all contact between the prisoner and his family or friends for a period of ten days, capable of being renewed. In extreme cases, the same restriction can be placed on contact between the prisoner and his legal adviser. The order may be issued at any time between arrest and trial. A hearing may be granted before the order is made if it is requested, but it is not required by law. The order is recorded in writing and communicated to the prisoner as a matter of practice, but this is not obligatory. If the prisoner becomes dangerously ill, the public prosecutor may permit him to be visited by a close relative; otherwise no person other than the public prosecutor, police officers and prison authorities is allowed to communicate with the prisoner, except in those cases where the order has been extended to apply to the prisoner's legal adviser as well. The order is not subject to appeal, and may be rescinded only by the public prosecutor.

It is considered that the following minimum principles should apply to *mise au secret* in systems where it is practiced in order to

satisfy the requirements of the Rule of Law:

1. A state should not have recourse to *mise au secret* as a form of detention unless it is absolutely necessary to do so in the interests of internal or external security, and unless it is urgently necessary to prevent the destruction of evidence, the escape of suspects or collusion between accomplices.

2. The scope of *mise au secret* must be regulated in detail by law.

3. *Mise au secret* should be ordered by a competent judicial officer.

4. The maximum period should be fixed by law, and if extensions are permitted, an absolute maximum should also be fixed.

5. Decisions to order *mise au secret* should be capable of challenge by way of appeal.

6. *Mise au secret* should not involve any restriction on the right of the arrested person to communicate with his legal adviser, his medical practitioner, minister of his religion and, in the case of an alien, his consular officer.

PART IV

DETENTION UNDER EMERGENCY LEGISLATION

The earlier parts of this report were concerned with the right of communication of persons accused of criminal offences in normal circumstances. In many countries there exists a system of emergency legislation permitting the detention of persons in certain other circumstances, and authorising special restrictions on the right of communication in cases of such detention. Such emergency legislation can relate to the detention of an alien on the authority of a minister pending deportation, or of persons suspected of committing or attempting to commit crimes against the state, or of persons accused of committing ordinary crimes during a period declared to be an emergency. Legislation which declares that for reasons of public security or otherwise a certain period of time shall be considered a period of emergency often alters the ordinary criminal procedure of the land in the case of certain prescribed offences and often imposes more deterrent punishments. Such legislation sometimes provides for preventive detention or detention under circumstances in which the ordinary prison rules will not apply. Preventive detention is sometimes provided for by special legislation not necessarily enacted during periods of emergency. Examples of legislation providing for preventive detention are the Preventive Detention (Temporary Provisions) Act, 1959, of *Southern Rhodesia* under which the right of communication of the detainee is restricted, and the Security of

Pakistan Act, 1952, authorising the detention of persons likely to act in a manner prejudicial to the defence, external affairs, or security of *Pakistan*, or to certain other matters. This latter Act merely provides that the person concerned may be detained "in such manner and under such conditions" as the Government may specify, and makes no provision for communication or visits.

In *South Africa* persons may be detained under the Public Safety Act of 1953. Regulations made under this Act provided that no person detained in pursuance of the Act may receive a visit from any person, including his legal adviser, except with the permission of the officer in command of the place of detention in consultation with the Police Authorities. This regulation has been held invalid by the Supreme Court in so far as it purports to take away the right of the detainee to see his legal adviser, but there is a conflicting decision upholding the regulation. It is now the practice to permit adequate consultation.¹⁰

In *Ceylon* a special law called the Criminal Law (Special Provisions) Act, was enacted in 1962, providing special procedure for the arrest and trial of persons suspected of being involved in a conspiracy to overthrow the government. Under this Act arrested persons have no right of communication whatsoever unless permission for such communication is granted by the Permanent Secretary to the Minister of Defence. The manner in which communications may be made where they were permitted was left to the discretion of the Permanent Secretary. In *Jordan*, however, persons detained under emergency legislation, so far as the right of communication is concerned, are treated in the same manner as unconvicted prisoners. The Public Prosecutor, however, has the right to make an order restricting the right of communication to the extent of excluding even the legal adviser.

Emergency legislation which was recently in force in *France*, and terminated last year, extended the period of *garde à vue* in certain cases to a maximum of fifteen days. The arrested person was entitled to be examined medically after twenty-four hours in custody, but apart from this all other communication is subject to the discretion of the police.

It will be seen from the few illustrations given above that it is extremely difficult to establish any general principles in relation to detention under emergency legislation, as the nature of the emergency may vary and may or may not justify extremely repressive measures according to the circumstances. But under any circumstances the use by the Executive of long periods of detention as a means of extracting

¹⁰ Since this Report was prepared South Africa has introduced detention in police custody for 90 days renewable. See *Bulletin* No. 17 (July 1963) of the International Commission of Jurists.

confessions or incriminatory statements by resorting to torture, force or undue influence must be condemned.

It is considered, however, that whatever the nature of the emergency, the following minimum rights and principles should be legally recognised in states subscribing to the Rule of Law:

1. The detainee shall have all the rights of an unconvicted prisoner, unless deprivation of these rights is genuinely necessary in the interests of internal and external security.
2. The detainee shall not in any event be deprived of his right of communication with his legal adviser.

ANNEX A

**STUDY OF THE RIGHT OF ARRESTED PERSONS
TO COMMUNICATE WITH THOSE WHOM IT IS
NECESSARY FOR THEM TO CONSULT IN ORDER
TO ENSURE THEIR DEFENCE OR TO PROTECT
THEIR ESSENTIAL INTERESTS***

(an outline)

I. INTRODUCTION

The constitutional or legal basis of the right to communication will be examined. An indication will be given whether under the particular legal system under study, an arrested or detained person may be kept incommunicado or under similar restrictions.

II. CONTENT AND SCOPE OF THE RIGHT TO COMMUNICATION

A study will be made of the substance of the right to communication, the conditions and limitations to which its exercise may be subject, and the grounds and reasons for such conditions and limitations. Special restrictions on the right which result from the status of incommunicado, *mise au secret* or other similar status shall not be dealt with in this chapter, but will be studied separately under chapter III below. The following situations will be examined under this heading:

A. The right of the arrested person to notify his relatives, counsel or any other person of his arrest and of the place of custody

Has the arrested person the right to notify anybody concerning his arrest and the place where he is kept in custody? Whom is he entitled to notify? How soon after the arrest may the person arrested be allowed to give such notification? How is the exercise of this right facilitated? For example, is the arrested person informed of the right? How may the arrested person send the notification? Are the authorities required to notify any person (e.g., relative or person enjoying the confidence of the detained person) regarding the arrest, with or without being requested to do so by the arrested person? If so, who are the authorities? Has the arrested person the right to designate the person to be notified? In case of transfer to another place of custody, are the authorities required to notify the detained person's relatives or any other person of his confidence?

B. The right to receive visits

1. Who may visit the arrested person? Is permission from any authority required before any person can visit the arrested person either at his own request or that of the visitor's? From whom and how may such permission be obtained?
2. May the right of an arrested person to receive visits be restricted? If so, who may order such restrictions and on what grounds? May visits be

* This questionnaire was prepared by the Human Rights Division of the United Nations.

restricted, for example, in the interest of the investigation, for the security and good order of the place of custody, or as a form of punishment for disciplinary offences? Where visits are banned or restricted, are other forms of communication available to the arrested person?

3. Conditions under which visits may take place? Are these conditions prescribed by law or by administrative regulations? In particular, when and how often may such visits take place? What degree of supervision is exercised by the authorities over these visits? Is the arrested person allowed to talk to his visitors in private or only in the presence of or within the hearing of an official of the place of confinement or of any other authority? Are there special rules governing visits by legal counsel? For example, has counsel the unrestricted right to see the arrested person at any time? Under what conditions may interviews between counsel and the arrested person take place? In particular, is counsel allowed to interview the arrested person freely and out of the hearing of any official of the place of custody or of any other authority? Are there special rules governing visits of physicians, priests, etc.?

C. The right to send and receive communications

1. With whom may the arrested person communicate?
2. May the right of the arrested person to send or receive communications be restricted? If so, who may impose such restrictions and on what grounds? For example, may restrictions on the right to communicate be imposed in the interest of the investigation, etc., or as a disciplinary measure?
3. Conditions under which the arrested person may send or receive communications? In particular, are such communications subject to censorship by the authorities in charge of the place of detention or by any other authority? May the police or other authority record telephone conversations without the knowledge or consent of the parties concerned or with the knowledge or consent of one of the parties only? Are there special rules governing correspondence between the arrested person and certain categories of persons or officials, e.g., counsel, prison officials, judicial officials, etc.? Are the parties concerned informed of the fact that a communication has been withheld from the arrested person or has been censored?
4. How is the exercise of the right facilitated? For example, is the detained person allowed to use the telephone? Is he given writing material? How may he send his message or correspondence?

D. Remedies and sanctions

1. What remedies are available to the detained person, or anyone acting in his behalf, in case his right to communication is denied arbitrarily or is subjected to arbitrary restrictions?
2. What sanctions are provided by the law in case of abuse by the authorities concerned?

III. INCOMMUNICADO, MISE AU SECRET OR OTHER SIMILAR RESTRICTIONS ON THE RIGHT TO COMMUNICATION

1. May the arrested person, while under investigation or preliminary examination, be placed under a special régime (e.g., incommunicado, *mise au secret*, etc.) or subjected to special measures forbidding or restricting his right to communication?

2. On what grounds may an arrested person be held incommunicado, *mise au secret* or placed under similar restrictions (e.g., to prevent any collusion between the arrested person, accomplices and witnesses, or the suppression of evidence, or the escape of suspects)? Are the grounds specifically laid down by law?
3. When may an arrested person be kept incommunicado or placed under similar restrictions? May he be kept incommunicado upon his arrest, while he is in police custody and prior to being brought before a magistrate or other competent authority? Can he be kept incommunicado before or after he is interrogated by the authority competent to conduct the pre-trial proceedings?
4. Who may issue the order? Has the police authority to keep the arrested person incommunicado? Must the order be issued by the authority competent to conduct the preliminary examination of the arrested person? May it be issued by any other authority (e.g., public prosecutor)?
5. Procedures. Is a formal request or application by the police or other authority necessary? Is a hearing conducted? Is the arrested person or his counsel entitled to be heard before an order is made?
6. Requisites of the order. Must the order be in writing? Must the order indicate the specific grounds which justify the measures to be taken? Is the arrested person informed of the order?
7. Extent and scope of the restrictions placed on the arrested person
 - (a) The right to receive visits
Is the arrested person completely forbidden from seeing anyone? Are certain persons allowed to visit him, e.g., counsel, physician, dentist, chaplain, warden or other officials of the place of confinement, police officers, prosecuting attorney, judicial officials, etc.? If so, under what conditions?
 - (b) The right to send or receive communications, documents, etc.
Is he allowed to send or receive any communications, etc., to or from anybody? If so, under what conditions? For example, would he be allowed to communicate with (i) counsel; (ii) the authority in charge of the preliminary examination proceedings; (iii) officials of place where he is kept in custody? Is he allowed to ask for and/or receive information regarding his family (e.g., health or illness of any near relative) or his business affairs? Are his relatives or persons enjoying his confidence informed of any serious illness or injury which might befall the arrested person, or, in case he is transferred to another institution?
8. Duration. For how long may the arrested person be kept incommunicado or placed under similar restrictions? May such period be indefinite? Is there a maximum time limit prescribed by law? Are extensions allowed? If so, for what period and under what conditions?
9. Termination of remand incommunicado or similar measures. Who may terminate the remand incommunicado or the special restrictive measures? May such measures be terminated at any time?
10. Is the order subject to review by an authority other than the official who has given the order?
11. Has the arrested person, or any person on his behalf, the right to challenge, lodge a complaint against or appeal from, or request termination of the order?

IV. THE RIGHT TO COMMUNICATION OF PERSONS ARRESTED UNDER EMERGENCY OR EXCEPTIONAL SITUATIONS

The questions studied under II and III above will also be examined in so far as they may be relevant to this topic.

Note 1:

The Committee will appreciate receiving texts of all relevant laws, police regulations, prison regulations, judicial decisions or other documents concerning the subjects indicated in the outline.

Note 2:

The committee will also appreciate receiving information concerning the question of the right of convicted persons to communicate, with particular reference to the problem of solitary or close confinement, whether imposed as part of the sentence or as a disciplinary measure.

DOCUMENTS

MEETING OF THE BRITISH AND FRENCH SECTIONS

On June 29, 1963, the British Section of the International Commission of Jurists, *Justice*, and the French Section, *Libre Justice*, held their joint meeting in Paris. Papers were prepared on aspects of English and French law which were of common interest and discussion of the papers followed.

The two themes at what is now firmly established as an annual event were "The Right of Asylum" and "Privilege in the Law of Evidence". The British contributors were the Hon. Mr. Justice Lawton, who wrote on "Crown Privilege", and Mr. L. J. Blom-Cooper, Barrister-at-Law, who read a paper on "The Right of Asylum". The French contributors were Me Nicolas-Jacob, Avocat à la Cour de Paris, whose paper dealt with "Privilege and Evidence in the Criminal Courts", and Mlle Jacqueline Rochette, Avocat à la Cour de Paris, who wrote on "The Right of Asylum in France". Each contributor wrote on the law of his own country.

The papers by Mr. Justice Lawton, Mr. Blom-Cooper, Me Nicolas-Jacob and Mlle. Rochette are published in the following pages - that of Mr. Blom-Cooper is a summary of what he said.

CROWN PRIVILEGE

by

SIR FREDERICK LAWTON *

It is a fundamental principle of the administration of justice in England, firstly, that trials should take place in public and, secondly, that those who give evidence should say on oath whatever is relevant to the issues before the Court and should produce whatever documents are relevant.

The application of this principle in all cases might, however, bring about injustice to individuals and harm to the public. English law has been alive to the dangers inherent in the over-rigid application of a principle which is so attractive as a juridical concept. Over the years exceptions have been accepted. One of the exceptions relates to the disclosure in Court of information which the public interest requires should not be disclosed. When stated in these general terms few could argue convincingly against it. English legal experience, however, has shown how difficult the application of this principle to a particular set of facts can be. Opinions differ as to what the public interest does require. Whose opinion is to prevail? How is that opinion to be ascertained? What is to happen if the judge disagrees with the authoritative opinion? Does this principle apply to criminal trials?

It is now established that "those who are responsible for the national security must be the sole judges of what the national security requires. It would be obviously undesirable that such matters should be made the subject of evidence in a court of law or otherwise discussed in public" (per Lord Parker of Waddington in *The Zamora* [1961] 2 A.C. 77 at p. 107; see also *Chandler v. Director of Public Prosecutions*, [1962] 3 All E.R. 142). Under the British Constitution those responsible for the national security are the ministers; each has his own sphere of responsibility, i.e. foreign affairs, the Army, the Navy, etc. In civil proceedings a Minister may ask the Court to rule that evidence, whether oral or documentary, intended to be given should not be admitted on the ground that the disclosure of the evidence would damnify the public interest. It is important to note that the Minister cannot on his own authority refuse to produce evidence; nor can he on his own authority stop any one from giving evidence. All he can do is to ask the Court for a ruling that he shall not be called upon to produce evidence

* One of Her Majesty's Judges of the Queen's Bench Division of the High Court of Justice.

or that a witness shall not be allowed to give oral evidence about a particular matter. The ruling is judicial, not ministerial. The judge, however, must give his ruling in accordance with the law. The law is accurately summarised in the headnote to the decision of the House of Lords in *Duncan v. Cammell Laird & Co.* [1942] A.C. 624:

"A court of law should uphold an objection taken by a public department, called on to produce documents in a suit between private citizens, if on grounds of public policy they ought not to be produced. Documents otherwise relevant and liable to production must not be produced if the public interest requires that they should be withheld. The test may be found to be satisfied either (a) by having regard to the contents of the particular document, or (b) by the fact that the document belongs to a class which, on grounds of public interest, must as such be withheld from production. It is essential that the decision to object should be taken by the minister who is the political head of the department concerned and that he should have seen and considered the contents of the documents and himself formed the view that on grounds of public interest they ought not to be produced. If the question arises before trial, the objection would ordinarily be taken by affidavit of the minister. If it arises on subpoena the objection may in the first instance be conveyed to the court by an official of the department, who produces a certificate signed by the minister stating what is necessary, but if the court is not satisfied it can request the minister's personal attendance.

"An objection validly taken to production on the ground that it would be injurious to the public interest is conclusive. The mere fact that the minister or the department does not wish the documents to be produced is not an adequate justification for objecting to their production. Production should only be withheld when the public interest would otherwise be damnified, as where disclosure would be injurious to national defence or to good diplomatic relations, or where the practice of keeping a class of documents secret is necessary for the proper functioning of the public service. In such a case the court should not require to see the document for the purpose of ascertaining whether disclosure would be injurious to the public interest."

The application of the law as enunciated in *Duncan v. Cammell Laird & Co.* was easy – but the results of its application on occasions caused disquiet. Lawyers found that ministers tended to claim privilege for documents the disclosure of which to the understanding of the ordinary citizen could not possibly damnify the public interest. In the years following the end of the second World War the problems relating to claims for Crown privilege became fairly common and tended to affect the everyday lives of citizens. For example, there were many wives who wanted to prove that their husbands whilst away at the war had committed adultery. They would get information that their husbands had contracted venereal disease and would seek to discover from service medical records when this had happened and the identity of the doctor who had carried out treatment. The Service Ministries always refused to disclose information of this kind and on the authority of the decision of the House of Lords in *Duncan v. Cammell Laird & Co.* the

judges had to uphold the objections. In 1953 in *Ellis v. Home Office* [1953] 2 Q.B. 135 the Court of Appeal expressed judicial disquiet at the claims of privilege made by Ministers. The first paragraph of the headnote to that case reads as follows:

“While it is essential that responsible government departments should be entitled to claim privilege for documents the disclosure of which would be against the public interest, and that the decision of the responsible minister in respect of any particular document should be final, it is desirable in the interests of justice that documents coming within the ambit of privilege should be most carefully scrutinized and that the person entrusted with that task should, in regard to each document, consider whether the harm done to the public interest by disclosure is sufficient to outweigh the hampering or impeding of a plaintiff's case if that evidence is not made available.”

In 1956 the Lord Chancellor announced in the House of Lords the principles of policy which for the future ministers would follow when deciding whether to claim privilege: these principles meet the criticisms made by the Court of Appeal in *Ellis v. Home Office*.

After 1956 the Home Secretary went on claiming privilege for police reports on the ground that they belonged to a class of documents which it was necessary to keep secret for the proper functioning of the public service. As a result of two malicious prosecution cases shortly afterwards, the Law Officers became alive to the fact that these claims were resulting in injustice being done to both private citizens and the police. The consequence of this was that the Lord Chancellor in 1962 announced the following modification of ministerial practice:

“Privilege will not be claimed in proceedings for malicious prosecution, wrongful arrest and other proceedings against the police where the justification for the prosecution, arrest, or other police action is an issue in the proceedings, unless the disclosure of the statement would reveal the identity of a police informer. Secondly, where privilege is claimed for such statements on the ground of public interest, the claim will not be made by a Minister's affidavit or certificate but the Court will be left to decide, having regard to the principles laid down in the cases, whether the statements should be produced.”

In criminal cases Crown privilege is never claimed in relation to any fact which bears directly upon the matter in question. In relation to such facts the Courts protect the public interest by hearing the evidence relating to them *in camera*. When the facts sought to be proved are not directly in question, the Courts will not compel witnesses to disclose them.

Problems of Crown privilege seldom arise in the criminal courts. Sometimes a prisoner, when cross-examining a police officer, tries to find out who informed against him. The courts stop this kind of cross-examination unless the evidence sought to be brought out is directly relevant or necessary in the interests of the prisoner.

PRIVILEGE AND EVIDENCE IN THE CRIMINAL COURTS

by

NICOLAS JACOB *

The evidence of witnesses is the most common method of proof in criminal cases. This explains the lengthy rules devoted to this method of proof by the Code of Criminal Procedure. But even so the Code gives no definition of this term and this must be deduced from its provisions. It may be said that giving evidence is what is done by those who with knowledge of facts relevant to a criminal charge are called to give evidence "either on the facts relating to the charge or on the personality or character of the accused" (cf. 331 and 444, Code of Criminal Procedure).

Witnesses – Denouncers and Informers

Witnesses must not be confused with denouncers or informers. Denouncers are those who go to the appropriate authorities either by writing or telephoning or in person and, being neither obliged nor asked to do so, report a criminal offence or sometimes even reveal the identity of the criminal. Whereas the denunciation of a crime is spontaneous and voluntary, a person gives evidence when called upon to do so. It frequently happens that a police officer complains to a witness of his delay in notifying the police of what he knew or heard, but the witness has a perfectly good reply if he says that this is because he was not asked. The witness's attitude no doubt shows a lack of public spirit but as far as the law is concerned he commits no wrong (cf. the important article on "Denouncers" by M. Fernand Cathala, chief regional commissioner of the Toulouse regional *police judiciaire*, in *Revue de la Sûreté Nationale*, No. 44, August/September 1962, p. 47 and No. 45, November/December 1962, p. 45). Although there is a distinction between denouncers and witnesses, a denouncer is none the less a competent witness, but the president must warn the Court that the witness is a denouncer. Failure to observe this requirement is not, however, a ground for setting aside the verdict. A denunciation for which the law provides a monetary reward does not prevent the denouncer from giving evidence unless there is an objection by one of the parties or the *Ministère public* (cf. Articles 337 and 451, Code of Criminal Procedure). The informer, besides being a denouncer, is a person who informs the

* Avocat à la Cour.

police in secret and thus without the knowledge of the person informed against in the hope of monetary or other reward for services rendered. Even though some police informers act without seeking reward, it is nonetheless true that they all act in the same way, that is, in secret. In these circumstances they are denouncers who are not also witnesses.

Witnesses

Not all persons with knowledge of facts relating to a criminal offence are competent witnesses. Certain categories are excluded either because our law is not prepared to give them credence or because of suspicion of bias. Thus, infants below the age of 16, insane persons and those sentenced to loss of civil rights or the disqualifications of Art. 42 of the Criminal Code are not competent witnesses. In addition, a person may not be both party and witness in a criminal trial. This rule excludes as witnesses the prosecutor, *la partie civile*,* and all persons carrying out judicial functions. In the case relatives and friends of the accused are also not competent as witnesses in the strict sense, at least at the trial itself (cf. Articles 104, 108, 335, 447, 448 of the Code of Civil Procedure).

The Duties of a Witness

A witness is required to appear, take an oath and give evidence stating truthfully what he knows. He may be compelled to appear (Articles 109, 326, 439, Code of Criminal Procedure). A witness who fails without good reason to appear before the juge d'instruction, his deputy or the trial court is punishable by a fine (cf. Articles 109, 326, 438, Code of Criminal Procedure). Those who are incompetent as witnesses in the strict sense may make a statement but not an oath. Article 361 of the Criminal Code provides for penalties for those giving false evidence. False evidence means that the witness has not stated the whole truth and that his evidence was capable of influencing the decision. Thus, failure to state a fact may amount to false evidence if the omission is capable of changing the sense of the statement and of leading the judges into error (Cass. crim., 12 Jan. 1915 S. 1916, 1-91). The witness's motives are irrelevant. It is similarly punishable for a witness, in order to defeat the ends of justice, to deny having seen or heard the facts on which he is called to give evidence. In addition, according to Article 3 of the Code of Criminal Procedure, any person who states publicly that he is aware of the identity of the authors of a crime and who refuses to answer questions on such a matter put to him by the juge d'in-

* *La partie civile* corresponds to the prosecutor in being the complainant, but differs in that he joins the criminal proceedings with his claim for damages.

struction is liable to imprisonment for two days to one year and to a fine of 375 to 7200 francs.

Professional Privilege

By Article 109 of the Code of Criminal Procedure the law exempts from giving evidence all persons who are forbidden by Article 378 of the Criminal Code to reveal secrets except in cases expressly provided for by law. Professional secrecy applies in the case of medical practitioners, surgeons and persons engaged in ancillary practices such as chemists, midwives and all persons who by virtue of either their public office or profession or temporary or permanent functions are entrusted with secrets. As the cases emphasize, the law seeks to protect confidences which an individual is obliged to state to a person exercising a particular profession either in order to receive informed advice or because complete frankness is required for some good reason. Those to whom secrets are communicated in the way of their profession are known as "confidants of necessity"; those whose work merely enables them to learn confidential information are not bound to professional secrecy by the law. Such would be the case of domestic employees and business agents, as such persons merely hire out their services or act as agents and their profession is not one which the law sees fit to protect in the public interest by professional privilege. The classic cases of confidants of necessity are members of the medical profession, doctors, surgeons, health officers, midwives, chemists, nurses, etc. (the list is not exhaustive). The same applies to *avocats* and *avoués* (broadly barristers and solicitors) and public officers such as notaries and agencies for monetary exchange. Certain public employees who directly serve the public, such as post office employees, must also be regarded as confidants of necessity.

Notwithstanding the separation by law of Church and State, freedom of conscience requires that priests are obliged to maintain secrecy on what they learn in the way of their office. Priests must not break the secrecy of the confessional and also are not allowed to discuss what has been stated to them in confidence outside the confessional (Cass. crim., 4 Déc. 1891, D 92-1-139). Auditors of limited companies, accountants and bookkeepers, arbitrators and referees may also be regarded as confidants of necessity, but there are many other professions and posts where the law does not allow disclosure of secrets: judges and juries, civil servants and particularly the police. These certainly cannot be described as confidants of necessity. Secrecy is enforced here solely in the public interest and more especially in the interest of State authority. This is so much so that there is no longer an obligation of secrecy if the interest of the administration does not require it. Thus, e.g., public

employees are not able to refuse to disclose documents in their possession to tax officials seeking to assess taxes.

The reason why professional secrecy applies in professions where persons are confidants of necessity is that fundamental human rights so require – the right to physical integrity, freedom of conscience, the right of defence, freedom of transaction, etc. Professional secrecy also applies to various public officials whose functions call for secrecy in the interest of individuals. There is, however, one profession where professional secrecy does not apply, even though this profession is an emanation from fundamental rights. This is the case of journalists. The professional privilege of journalists applies in special circumstances and for this reason writers take the view that generally there is no professional privilege in the case of journalists. M. Fernand Terrou, director of the French Press Institute and legal adviser to the Minister of Information, wrote in *Le Monde* on June 17, 1960, “*a priori* it seems paradoxical to bring in the idea of professional secrecy, that is, a prohibition on disclosing facts, in a profession whose essential object it is to make facts known. The question is not that of protecting confidential information, but of protecting the source and for this reason the expression ‘protection of sources’ is to be preferred to the expression ‘professional secrecy.’” M. Terrou takes the view that secrecy on sources of information cannot be achieved simply by adding journalists to the list of professions included in Article 378 of the Code of Criminal Procedure. He proposes the setting up of a journalists’ council to gain recognition of a journalist’s privilege not to disclose his sources of information.

From the legal point of view, M. Terrou is certainly in error. The cases have long recognized a police commissioner’s privilege, which essentially consists of refusing to disclose his source of information. Inspectors and commissioners of police may refuse to disclose in Court the name of their informants (Cass. crim. 4 April 1924 D.P. 1925-1-10). If the terms of Article 378 of the Criminal Code are wide enough to give this privilege to police officers, there is no logical reason why they are not wide enough to cover journalists. We are not entirely convinced either by the judgement of the Maritime Court of Cherbourg, which fined a journalist in 1923 for refusing to disclose his sources of information on the ground that journalists are not “confidants by public office” to whom private citizens are obliged to go and who as such would have a privilege against giving evidence. On the contrary, it seems to us that just as the privilege against disclosure by the priest is the corollary of freedom of conscience, so is the journalist’s privilege against disclosure the necessary consequence of freedom of ideas and freedom of the press. This is the more so in that all the modern methods of information are in the hands of public authority. To provide a

counterweight to official information it is essential that the journalist be able to protect his sources of information, otherwise freedom of the press has no meaning. In fact, since the Press Law of 1881 there have been very few cases in France where journalists have been convicted for refusing to disclose their sources of information. In a general way, judges and police officers who question journalists on their sources of information or on facts which they could have learnt in the exercise of their profession, accept without difficulty that the journalist no longer remembers certain details even if they are sometimes vital (cf. the survey of the International Press Institute on the professional secrecy of journalists in 1962, French translation on the position in France *Les Cahiers de la Presse française*, May 1963, p. 11). In recent years a number of cases have brought the matter into prominence. They show that it would be useful for the professional privilege of journalists to be finally recognized in France as is the case for instance in West Germany.

D) The Georges Arqué and René Didiot Case, 1948

In June 1948, Pierre Garrot, known as Crazy Pete, escaped whilst being taken from the courts to prison. The police were attacked in the press for their failure to recapture him. On July 17, Crazy Pete, armed and accompanied by one of his men, came to the offices of *Paris Presse* to see a reporter, Georges Arqué, about an article which made him out to be a police informer. Two days later he went again to the newspaper offices and had a conversation with Arqué and another reporter, Didiot. On the basis of this interview, Arqué and Didiot published an article purporting to give an account of a meeting between Crazy Pete and the reporter in a forest. "Public Enemy Number One", as the press called Pierre Garrot, was arrested shortly afterwards. One morning the police came with the milk and arrested Arqué and Didiot. They were detained on a charge under Article 62 of failing to report a criminal. Arqué was questioned for five hours by the judge and invoked professional privilege. He also claimed to have informed the police of his conversations with Crazy Pete, and indeed, the article had been sent to the police before the newspaper came out. The two journalists were set free a week later after protests by the Journalists' Union. From the legal point of view the charge fell to the ground because Article 62 of the Criminal Code "does not lay down a general duty to give information about every person whom one knows to have committed a crime specified by the Article. There is no duty to inform the authorities of the identity or whereabouts of the criminal but only of the crime itself so that the authorities may take appropriate steps to stop the criminals from reaping the benefits of their crime or prevent the commission of further crimes" (Cass. crim.

2 March 1961 J.C.P. 1961-II-12092, note by Jean Larguier, Professor in the Faculty of Law of Grenoble).

II) The Robert Barrat Case

In September 1955, Mr. Robert Barrat published a series of articles in *France Observateur* reporting his stay with a group of Algerian rebels. Mr. Barrat was arrested on a warrant issued by the judge in Algiers. He was released pending the proceedings. Because of the almost unanimous protests of the press it was decided to let the matter drop.

III) The Georges Arnaud Case

Mr. Georges Arnaud of *Paris Presse* had been invited with other correspondents to a secret press conference given by Mr. Francis Jeanson, a professor of philosophy and former journalist who was wanted by the police for having set up a network in support of the F.L.N. Two days after the publication of the report of the press conference in *Paris Presse*, Mr. Arnaud was arrested and on June 17, 1960, he appeared before the Military Court charged with failing to report persons engaging in activities prejudicial to the security of the State under Article 104 of the Criminal Code. Mr. Arnaud was given a suspended sentence of two years' imprisonment. The *Cour de Cassation* set aside this decision on the ground that the Court had acted on the basis of Article 104, which could not apply to acts prior to June 1960, the date on which the new Article 104 was promulgated. This Article (at present Article 100 of the Criminal Code) lays down that except for persons protected by privilege against disclosure, any person who has knowledge of treasonable plans or acts, calculated to prejudice the defence of the country, and who does not bring such plans or acts to the notice of the military, administrative or judicial authorities as soon as they come to his knowledge, shall be punished in war time by imprisonment for at least 10 and not more than 20 years and in peace time by imprisonment from one to five years and by a fine of 3,000 to 30,000 francs. It is perfectly possible that the case law on Article 62 is to be applied to this Article and therefore that only the facts of the crime must be reported and not the identity or the whereabouts of the criminal. In this case, the journalist would commit no offence under Article 100 of the Criminal Code if he submitted his article to the authorities prior to publication.

IV) The Nouveau Candide Case

In September 1961, Mr. René Maine, director of the weekly *Nouveau Candide*, and Miss Georgette Elgey of his staff were sum-

moned to appear as witnesses before the Military Court in the case known as the Paris plot. They had published extracts from the diary of ex-colonel Godard, one of the accused who was being sought by the police. They were asked how they obtained these extracts and how they had managed to decode certain names. They invoked privilege against disclosure and replied that they could not reveal their sources. The Court merely noted their refusal. There was no prosecution.

There has then for a very long time been no prosecution against journalists on the ground that they have refused to answer questions as a witness. Recent cases show that an attempt is always made to find a different offence with which to charge them for having done so. This is readily understandable since the authorities have in a way given approval to this privilege of journalists in general. In July 1918 the National Union of Journalists set up a code of professional ethics which was revised and enlarged in 1938. This code lays down that any journalist worthy of the name must maintain secrecy on his sources of information. A decree of December 7, 1960, on the position of journalists of the *Radio-Télédiffusion Française*, lays down in Article 5 that they must abide by the 1918 Charter. It is even provided that disciplinary measures may be taken for breach of these duties and consequently for breach of the duty of professional secrecy. On the more general level, the draft Code of Honour drawn up by the United Nations at the request of the Economic and Social Council in 1952 states that "discretion is necessary in relation to sources of information. Information communicated confidentially comes under professional secrecy and this must be respected. The right of professional secrecy may be invoked to the extreme limits of the law".

After examining these different aspects of the problem, we are of the opinion that there is nothing to prevent the Courts from recognizing the journalists' right not to disclose his sources of information by virtue of Article 378 of the Criminal Code. If this were done, the system of privileges granted to certain witnesses would be fully and properly integrated insofar as these spring from fundamental human rights. We have insisted on the need for journalists to have this privilege because this privilege must be recognized in a world where State intervention becomes greater and greater in all sectors of human activity and it is needed even in a democracy if the individual is not to be completely conditioned by the decisions of those in power.

RIGHT OF ASYLUM

SUMMARY OF PAPER BY Mr. LOUIS BLOM-COOPER *

General Observations

The way a country treats its aliens is one of the most unflinching tests of its civilization. There is, however, no legal duty owed to aliens. The obligation is simply a moral one.

History of Legislation

In the Naturalization Act 1870 all the old disabilities attaching to aliens were swept away and the alien was put on much the same footing as the more fortunate British subject, except that he had no political rights. Entry and exit were unimpeded, there was no general law of extradition. Britain at that time had, with the possible exception of the Netherlands, no rivals to its claim of being the most liberal in its treatment of aliens.

The years 1870-1914 marked a sharp decline in Britain's prowess as the protector of aliens, although in the years 1825-1905 no aliens were in fact expelled from Britain. As a result of the mass immigration of East European Jews, the Act of 1905 introduced control of admission by specifying undesirables who were to be excluded, i.e.,

- (a) those incapable of supporting themselves;
- (b) lunatics and others who by virtue of disease or infirmity seemed likely to be a charge upon the rates or otherwise a detriment to the public;
- (c) those convicted of extraditable crimes other than political offences; and
- (d) persons against whom an expulsion order under the Act had been made.

The Act provided a right for any immigrant to appeal to an appeals board sitting at each immigration port. This Act, which was a token surrender to popular demand, was comparatively mild in comparison with the Aliens Restriction Act, which was introduced in 1914.

The Aliens Restriction Act conferred on the Crown the widest possible powers with regard to the admission, treatment and deportation of aliens, and all its powers were exercisable by delegated legislation. The original purpose of the Act was to cover the emergency of war, but by virtue of the Aliens Restriction (Amendment) Act 1919 they have been extended every year successively under the

* Barrister-at-Law.

Expiring Laws Continuance Act. The House of Commons is prevented from debating the regulations under the Act.

Purpose and Practice of the Act

The purpose of the Act is to protect the social standards of the country. These, however, are not defined by any code. They are to be found in the practice of immigration officials and in important cases the faceless men in the Home Office.

An immigration officer is without equal in the power he wields – more than even the British policeman of comparable rank. He can refuse any foreigner leave to land for any reason or no reason at all; he can detain in prison, without producing him in court, any foreigner to whom leave to land has been refused. There is no official discouragement of aliens, only an unfriendly reception at our sea and airports.

Occasionally, as in the case of the representatives of the Naga Rebels from Nagaland (in the north-east frontier area of India) who came to England last year, it is possible to organize legal action through the application for a writ of *habeas corpus* before the unwelcome immigrant has been sent back, but such cases are exceptional.

Categories of Aliens

There are four main categories of aliens:

1. *Tourists*. They need only satisfy the immigration officer that they are genuine and have come only for a short while. The normal permission is for three months and the only restriction is that they must register whenever they stay in hotels. Every alien except tourists must register with the police.

2. *Au pair girls, students, businessmen*. These aliens are normally granted entry; they do not require work permits and they are officially welcome – if genuine. There is some evidence however that this dispensation is used as a device to dodge work permit regulations.

3. *Those claiming political asylum and special concessions to "distressed relatives"*. The demand for political asylum is frequently the cause of public controversy and these cases are always decided by the Home Office at a high level. The Home Office will usually grant political asylum if the alien's life and liberty may be endangered if he is returned to his country. It has, however, never been the function of the British Government to deport an alien to a named destination, but only to send him out of the country. In this respect it differs from extradition proceedings, and the complaint in the *Soblen* case was that deportation was being used as a device to

achieve extradition. In general it should be said that political asylum is not a right but a gift of the receiving country, and that it should not be used with any political motive.

4. *Aliens who come to work on a work permit, or to live without working for a substantial period.* An alien with a work permit will be given permission to stay in Britain for the duration of his permit. If he finds another job and wants to stay any longer he is bound to ask for an extension. Otherwise, the work permit would be used as a back door entry for an immigrant.

The alien who just wants to live in Britain, particularly if he is a political propagandist or liable to cause a nuisance, may find himself in difficulty. He must prove that he can be wholly self-supporting, and he must not take any employment. His passport is stamped for three or six months and it may be extended for a further six months, but he can never be certain that he will get a further extension.

Deportation

As has been mentioned, all aliens except tourists must register with the police, but other conditions are not burdensome.

There are substantially two ways in which an alien who offends against the British way of life can be removed. As part of a sentence for a criminal offence a court can recommend deportation. The Home Secretary has the power to order deportation if he "deems it conducive to the public good" that the alien should be deported. So long as it cannot be shown that the Home Secretary has acted in bad faith his decision cannot be challenged in the courts. He is not even bound to listen to any representations made to him.

As if sensing the injustice of this, the Home Secretary announced, in August 1956, that where a deportation order had been made or was contemplated against an alien otherwise than on the recommendation of a court it would be open to the alien to ask for a hearing by the Metropolitan Magistrate at Bow Street. The Magistrate could then make an advisory recommendation, but this has no legal force. The concession does not apply to orders made on grounds of security or where an alien has landed without permission or has failed to observe the conditions attaching to his stay. Thus deportation is purely an administrative act and, because of this, it cannot be regarded as in any way satisfactory.

THE RIGHT OF ASYLUM IN FRANCE

by

JACQUELINE ROCHETTE *

History

The origins of the right of asylum are found in ancient history. Temples, particularly Greek temples, sanctuaries, the tombs of heroes and statues of the Gods served as places of welcome and protection for criminals of all categories who were fortunate enough to reach them. In the Middle Ages the church and afterwards the secular power took in this inherited institution, perhaps on account of the crude uncertainties of justice in those violent times and because the ancient criminal law was based on vengeance. Against these notions feelings of religion and of humanity prompted ways of escaping from this vengeance. As superstitious belief declined this notion gave way to the right of a government to grant or to refuse the privilege of residence within its territory. The abuse of this right gave rise to limitations after the time of Charlemagne. Louis XII and Francis I abolished entirely the right of asylum except for king's residences (this is the origin of diplomatic asylum, which will be discussed later) and the house of the Grand Prior of Malta, who retained this privilege until the Revolution.

For the right of asylum a distinction came to be drawn between ordinary criminals and political criminals. Only too happy to be rid of ordinary criminals by the fact of their flight, states rid of this burden began to claim the return only of individuals whose political crimes concerned either the safety of the Prince or public order. Extradition became customary for those who had offended against the sovereign. This was due to the solidarity between the ruling houses of Europe to defend their royal institutions. This state of affairs went on until well after the Revolution. Indeed, the revolutionary governments took very severe steps against persons trying to leave the country, which led a great number of other countries to observe the laws of hospitality and humanity and so, for a long time the right of asylum depended on the whims of government and on considerations more political than humanitarian. In general, political offences were considered more serious than ordinary crimes. Napoleon I, who protested vehemently against violations of asylum by other states did not himself scruple to violate it in turn and to demand the return of French political refugees.

* Avocat à la Cour.

It was not until the liberal government of Louis Philippe that we see the principle of not extraditing for political offences and its necessary corollary, political asylum. This principle, laid down in the Law of October 8, 1930, was applied for the first time in a treaty concluded between France and Switzerland which excluded political offenders from the category of extraditable criminals, thus enshrining the notion of political asylum. But this principle was formally established only after the Revolution of 1848, when for the first time those who had been engaged in the struggle were themselves forced to seek refuge and to invoke this principle. From then onwards political asylum became an institution available to anyone at a given moment. France has given political asylum widely, not only to persons wanted or sentenced for political crimes but also to those persecuted on account of their religion, race, political or social beliefs. A little more than a quarter of a century ago many white Russians found asylum in French territory and there lived alongside those whom Italian and then Spanish fascism had convinced of their need to seek safety elsewhere. After the Spanish War, in particular, many fugitives found refuge in France. The asylum that was offered to them was an act of international courtesy and an act of humanity. In the same way many German Jews, driven out in the early days of the Nazis, followed the road which in other times victims of the Edict of Nantes had taken in the direction of Germany.

The Second World War increased the problem of asylum to a point never before known by raising the question of governments driven out by foreign invasion and led to seek refuge abroad. France has adhered to this line of conduct. The draft Constitution presented for acceptance by the French people on October 13, 1946, in its preamble guarantees the right of asylum "to every man persecuted by reason of his action for freedom", whereas even the Universal Declaration of Human Rights in Article 14 speaks only of the right to seek and obtain asylum and not to demand it.

This brief historical outline shows that political asylum raises numerous problems, not the least of which is defining it. The expression "right of asylum" is not really correct because the practice in asylum cases amounts to a permissive right only. It may be granted or it may be refused. Another difficulty is who is to enjoy the right of asylum — the political refugee who in his own country has committed a crime, or an innocent person driven to flight by racial or religious persecution? Further, what is France's attitude in relation to its own refugees? Does France claim their extradition from the host country? Conversely, what is France's attitude as the host country? The country of refuge must not harbour activities or plots against the rights or interests of the fugitive's own country. When the right of asylum arises in exceptional circumstances it must be kept

within strictly necessary limits. For this reason the right of asylum will be considered, as far as France is concerned, under the double aspect of France as the state giving refuge to the fugitive and also France as the country of origin of the fugitive. Three forms of asylum will be considered; political asylum given to the refugee who arrives at the French frontier to stay in France for a reasonably long period of time; diplomatic asylum in legations or embassies; maritime asylum on warships, granted to a person wanted or sentenced in his country for a political crime. Finally, the way in which asylum comes to an end will be considered.

Like Diogenes looking with his lamp for a man, we must look for a definition.

Definition

No legal term is so lacking in precision in its definition as the "right of asylum". It is not a right. It is merely a discretionary power of each state. The state has the right to grant asylum and the individual may enjoy the grant of this right. Asylum applies particularly to refugees wanted or sentenced in their own countries for political crimes and whose extradition is not permitted by international custom. This gives rise to another difficulty. What is a political crime?

There is no legal definition of a political crime but the definition which emerged from the Sixth International Conference for the Unification of Criminal Law, held in Copenhagen in 1935, seems satisfactory. "Political crimes are criminal acts directed against the organisation and the functioning of the state as well as those directed against the rights which the state gives to its citizens". But classifying an act as a political offence raises another difficulty. Of the two states concerned, which state has the right to classify the act as political or an ordinary crime? This is an important problem, for the state requesting extradition will tend, as we shall see in the case of France, to classify the crime of which the fugitive is accused as an ordinary crime. The generally accepted rule is that the classification of the crime is made in the last resort by the state in which he has taken refuge. Our definition must then deal with the three different types of asylum. Finally, it must take account of the other important category of refugees who may be given asylum, i.e. innocent victims of persecution. In the light of these observations the following definition is put forward:

The right of asylum is the power which a state has on the basis of a rule of law or of customary acts of grace to give protection on its own territory or in other places coming within its jurisdiction, legations, warships, to persons whose life or liberty is threatened by the state of which they are nationals, for political, racial or religious reasons.

Those to whom the right of asylum is granted

Before studying how the right of asylum operates in France, we must first consider to what persons it is granted. The right of asylum is not limited to the principle that extradition of political offenders is refused. In addition to criminal offenders there are other refugees who are not accused of any offences. They are victims of persecution from the country which persecutes them. They are in a special position. They are foreigners but an odd kind of foreigner who enjoys the protection of no government. They become *de facto* stateless. To this category of refugees must be added that of displaced persons, i.e. nationals of the allied nations, deported by the enemy, who were on enemy territory or territory occupied by the enemy. A great number of them did not wish to return to their respective countries. These displaced persons, many of whom were in France, have become refugees already in the receiving country, refugees by two stages. First stage: forcible expatriation; second stage: voluntary expatriation for political reasons. They have a right to asylum. These are the three categories of persons who may be granted asylum.

France as the country of origin of the refugee

It was necessary to explain these developments in order that France's attitude could be understood under its two aspects – the country of origin of the refugee, and the country in which he seeks refuge.

It may be pointed out that France's attitude as the country of origin fortunately only arises with regard to political refugees who are considered criminals after the time of religious or racial persecutions has gone. It must be pointed out that France does not lose sight of French nationals who have fled abroad for political reasons but considers them still personally subject to French jurisdiction although outside France's effective jurisdiction. It frequently happens that France claims their extradition from the receiving country (which takes a firm stand on the right of asylum) and this despite the fact that the rule that political offenders may not be extradited is included in the 1927 Law, in the 1946 Constitution and the Universal Declaration of Human Rights. There is a reason for this principle and this reason is worthy of respect. On the one hand the political offender is not dangerous in the country receiving him, since he is an enemy only of his own government and the institutions of his own country. On the other hand, it is to be feared that if the offender was returned he would be judged not by judges but by his political enemies, imbued with the spirit of hatred and revenge. But France does not comply with the international custom

according to which the country of origin must recognise the right of any other country to give asylum to political refugees without being able to regard this as an unfriendly act justifying retorsion.

It is, however, fair to point out that the notion of a political crime is one of the most changing conceptions in French law, since it varies with different régimes. At the present time the tendency is to limit the area of political crimes so as to permit the extradition of political offenders and to subject them to the punishment applied for political crimes, since political offenders tend to be considered as more deserving of punishment than ordinary criminals. So it was that a decision of the Cour de Paris on January 10, 1945, which attracted a good deal of attention, laid down that the crimes of treason, consorting with the enemy and acts prejudicial to the external security of the state are no longer considered in France as political crimes since the Decree of July 29, 1939, which laid down for these offences punishments applicable to ordinary crimes. As a result such offenders could be extradited. This decision has given rise to fierce criticism. Acting on the view laid down in this judgement, France protested against the propriety of asylum given by Spain to numerous collaborators with the enemy, in particular Abel Bonnard. The same tendency is to be found in the extradition treaties signed with the new African states which lay down that extradition *may* and not *must* be refused in respect of political offences. Further, as Professor Levasseur pointed out during our general meeting, it has not been possible to sign some treaties because they provide for extradition of political offenders. International Law sometimes takes the same positions. Thus, attempts on the life of heads of state are not considered as political offences and this clause is included in the treaties which France has signed with numerous countries with the exception of Switzerland and Italy, which enabled Italy to refuse France's request for the extradition of a number of accomplices in the assassination at Marseilles of King Alexander of Yugoslavia and President Barthou.

Customary international law does not consider war criminals as political offenders. Those who have committed crimes against peace or humanity may not be granted asylum. Indeed, the Convention on Genocide lays down in Article 3 that genocide is not to be considered a political crime and that signatory states are bound to extradite offenders. France has not sought to avoid this obligation. The present tendency for France to claim extradition of political offenders comes out clearly when there is another crime involved or when the crime is of a mixed character. In the case of another crime extradition is requested for an ordinary crime as well as for the political crime but France has signed a number of treaties with various European countries, excluding from extradition an ordinary crime committed with a political intention as well as

political crimes. It also happens that a demand is made for the extradition of a political offender who has committed a crime of mixed character, i.e. one crime only; an ordinary crime but one committed with a political intention. Several times recently France has requested the extradition of leaders or members of the O.A.S. who have fled abroad and has based the request on a crime of mixed character. Only a few weeks ago extradition was requested from Switzerland of Curutchet, an activist who had fled to Lausanne and who was suspected of having taken part in the murder of the banker, Lafond. In this case reliance was placed on a ordinary crime committed with a political intention. The Federal Court in Berne will hear this request in September.¹ If the application is granted the Court for State Security will try the case. It sometimes happens that France regards as an ordinary crime what to the receiving state is a political crime. Whatever is said of these various procedures, France does not always obtain satisfaction because it is the receiving state which in the last resort classifies the crime in accordance with the International Law.

The attitude of France as the country of asylum

We must now take a look at the other aspect of the right of asylum in France: what French practice is as regards the right of asylum on French territory, i.e. France's attitude as the receiving country towards refugees. Following a very liberal practice, France gladly accepts refugees. The grant of asylum gives the fugitive a *de facto* immunity but France always respects the right of the country of origin to protect and defend itself and the help which France gives is humane but not political. France refuses to encourage any possible activities by the refugee against his country or origin. This is, it is true, a passive obligation but France respects it scrupulously. The grant of asylum sets up a legal relationship between the receiving state and the refugee who is in the position of a stateless person since he can no longer call upon his own country for protection nor invoke the rights and privileges given to foreigners on a basis of reciprocity. For this reason France, which grants asylum to many, organised another form of protection in lieu, the Statute for Refugees, which covers all categories of refugees. International Law has also set up a statute for refugees after great post-war upheavals, first the Inter-governmental Committee for Refugees, I.C.R., U.N.R.H.A., the United Nations Relief and Rehabilitation Agency and finally the International Refugee Organisation (I.R.O.). All these institutions disappeared in 1950 and their functions were combined in the hands of

¹ The application was refused. Curutchet was deported from Switzerland, and arrested at Dakar Airport whilst in transit and then taken to France — Ed.

a High Commissioner for Refugees. This was carried out by Resolution 428 of the General Assembly of the United Nations and the Geneva Convention of July 28, 1951, which brings in a new and current definition of a refugee. Applying the terms of the convention, France set up in July 25, 1952, the French Office for the Protection of Refugees and Stateless Persons.

There are three categories of refugees in France:

Refugees under the statute who came before 1939 and who enjoy their acquired rights; refugees under the Convention of 1951; and *de facto* refugees. These three categories of refugees have been given asylum but only the first two are entitled to work. When a person presents himself at the frontier of his own accord and requests asylum, his case is examined by the French Office for the Protection of Refugees and Stateless Persons, which has to decide whether or not he is a refugee. If it decides that he is not, he has a right of appeal to an appeal committee. If he is recognised as a refugee he is given a residence permit. A special selection procedure was instituted in the case of persons coming from Spain in increasing numbers. Strong steps were necessary and although France continues to grant asylum to real refugees, many would-be immigrants have been refused entry when their purpose was purely economic and to look for work.

In order to be granted asylum in France, a refugee must nowadays prove that he has been the victim of persecution threatening his life and his liberty. The classification of refugee is, then, the first question and on this classification grant of asylum and the applicability of the special rules depend. Recognising this status is always an urgent and dramatic matter. As can well be imagined, not recognising it is even more so. Following Anglo-American practice, France recognises that the personal status of the refugee is governed by French law as the law of the domicile, which gives him a considerable advantage. He has a right to work in France, for France was one of the first European countries to realise that it was not in the interest of the receiving state to keep the refugee in a situation of inferiority and insecurity which would lower his morale and make it more difficult for him to adapt himself to the French way of life. The French Office issues him with papers but residence and work fall within the competence of other ministries.

As far as assistance to refugees is concerned, the French Government has entrusted this work to an association called *Social Service for Emigrants' Assistance* which distributes the funds allocated to it. But only a minimum of competence is allowed to the international authority, i.e., the High Commissioner's Office for Refugees, of the United Nations, which is why the French Office has a great deal of autonomy. By recognising the legal status of refugee the French Office gives to a refugee the legal and administrative

protection of the law and confers upon him the legal status of refugee under the Geneva Convention of 1951, in particular freedom of movement and protection of his life. A refugee recognised as such will not be interned.

From these observations, necessarily brief, the conclusion may be drawn that France gives asylum generously on its own territory but does not accept that its own nationals be granted asylum in other countries.

Termination of asylum

In what circumstances does asylum, which is widely given, come to an end? Apart from naturalisation and death, which do not require comment, asylum comes to an end in three cases. Firstly, the voluntary departure of the refugee who returns to his own country or resumes his former national status. Secondly, refusal of entry, which consists of the compulsory departure from France of a foreigner whose entry or stay is irregular. Finally, and most important, deportation, which is a decision taken by the judicial or administrative authorities that a foreigner must leave the country. Deportation may have dramatic consequences for the refugee. He cannot return to his own country, where his life and liberty are in danger. The expulsion order will make him suspect and undesirable to other countries. What is he to do? Enter a neighbouring country illegally or re-enter illegally the country that has expelled him. He will be known as a constant threat and will become an outlaw. France has solved this problem by assignation of residence which was introduced by the *décret-loi* of November 2, 1938, and confirmed by the *ordonnance* of January 12, 1945. A deported foreigner who shows that it is impossible for him to leave French territory will be ordered by the Minister of the Interior to reside in a fixed place and to report at intervals to the police. The International Convention of 1951 set out similar principles and forbids the deportation of refugees for reasons other than national security and public order and substitutes supervised assignation of residence, but it is to France's credit to have introduced these principles into its own legislation before the Convention. In addition, the *ordonnance* of 1945 gives a special guarantee to foreigners who have properly entered the country and to refugees. This guarantee puts the refugee in a better position than an ordinary foreigner as far as deportation is concerned. Both may appeal to a commission which advises the Minister of the desirability of deportation but, whereas the refugee always has this right, the right of the ordinary foreigner is restricted by the power of the administration to invoke "absolute urgency", which is a term used to take away the foreigner's right of appeal, which it in fact does in most cases. Moreover, the lodging of

an appeal suspends the expulsion order only in the case of the refugee. In practice the appeal commission does not request that the expulsion order be withdrawn but suggests assignation of residence in a place where the refugee may continue to earn his living, since the refugee has the right to work and the benefits that go with it except for practice of the liberal professions.

Diplomatic asylum

All this means that the state gives asylum on its own territory, exercising a power which requires the consent of no other state. It may, for humanitarian reasons, give asylum outside its territory and even within the territory of another state, that is to say, in its legations abroad or on board its warships. Historically, France has given diplomatic asylum to ordinary criminals as well as to political offenders. Louis XIV used this power a good deal and as a result had trouble with Pope Innocent XI, who wanted to put an end to the abuses to which this practice led. When the King stubbornly refused to comply the Pope went so far as to excommunicate his representative, the Marquis de Laverdin, and to ban the Church of St. Louis des Français.

Gradually, diplomatic asylum for ordinary criminals fell into disuse and now is a thing of the past, for this practice would be contrary to the recent trend towards international collaboration in the fight against crime. As far as political criminals are concerned, legal reason means that they should not be given asylum in embassies, for this is opposed to the well-established principle that the duty of diplomats is to look after the interests of their own nationals and not these of other countries. It is clear, then, that diplomatic asylum is not a right but humanity requires that in some circumstances an embassy should open its doors to a political fugitive when the case is urgent and no other means are available to the person seeking asylum. Diplomatic asylum was widely practised in Europe during the 19th century when the expansion of freedom with the French Revolution threw society into ferment. France itself was by no means free from this problem. On many occasions France has given asylum in its diplomatic missions:

In Venezuela, in 1858, but the Venezuelan authorities entered the legation and removed the refugees by force;

In Greece, in 1862;

In Turkey at the Smyrna Consulate in 1867;

In several South American countries, new countries where it has been said that revolutions are an everyday occurrence, France has frequently given diplomatic asylum.

In Chile, in 1858 and 1892;

In Paraguay, in 1848;

In Peru, in 1865 and 1913.

Diplomatic asylum has frequently been granted in Haiti, which was constantly rent by internal struggles, in the 19th century and at the beginning of the 20th:

asylum was granted in 1876, 1878, 1880, 1908 and 1915.

In 1915 the crowd stormed into the legation at Port-au-Prince and President Guillaume Sam, who had taken refuge there, was assassinated. The new government was obliged to apologise and make reparation.

French asylum was also given on a large scale by the French Embassy in Madrid: during the Spanish Civil War of 1936-39 and especially in the buildings of the French school which had been made an annex of the Embassy and with the consent of the Republican Government enjoyed extra-territorial immunity. French ships took an active part in the evacuations of refugees from the diplomatic missions in Madrid via Valencia to Marseilles. With great impartiality the French Ambassador, M. Herbette, took under his protection in Zarauz in the Balearic Isles refugees from the other side, who were also evacuated to France.

France has exercised this right in all countries where international custom recognises that diplomatic missions have power to receive refugees and to give them asylum. The view of the French Government appears *inter alia* from the instructions given in 1865 to the French Minister in Lima, who refused to hand over refugees, to the Peruvian authorities. The French Government approved his conduct in the following terms:

"The right of asylum is too firmly anchored in humanitarian feelings for France to agree to abandon it. It is necessary only to enable those who have engaged in political activity to leave the country when they may no longer stay without danger to themselves or to the country itself."

Consulates cannot give diplomatic asylum. This rule has always been found in International Conventions since the beginning of the 20th century. Usually, the provision, which makes no distinction between political and ordinary crimes, is as follows:

"Consuls shall, when requested to do so by the local authorities, hand over those accused or convicted of a crime who have taken refuge in the Consulate."

In conclusion, two cases of diplomatic asylum by other countries than France may be cited. They are the two most striking cases of recent years: the asylum granted in 1941 to the Grand Mufti of Jerusalem by the Japanese Legation in Teheran and that granted to Cardinal Mindzenty by the United States Legation during the events in Hungary in 1956, an asylum which the Cardinal has now enjoyed for over seven years.

Maritime asylum

Maritime asylum has for long been bound up with the principle of extraterritoriality of warships, a privilege which excludes them from the territorial jurisdiction of foreign states. Nowadays, the fiction of extra-territoriality is no longer accepted in international law. A ship is no longer considered as a part of the territory of the country to which it belongs. The privileges of a warship relate to its function as an organ of the state. It is an element of state power. This characteristic means that special consideration and treatment are required wherever it shows the flag. Applying these principles, the law recognises that ordinary criminals may not be given asylum on warships and, moreover, that the Captain is obliged to hand them over. As far as political refugees are concerned, humanitarian considerations have for long resulted in a theory and practice that they may be given asylum on warships but this power is facultative only. The Captain will give them asylum only if they are in sufficiently imminent and serious danger. It is in relatively few cases that France has given maritime asylum. In 1862, in Greece, and in 1865, in Peru, it was given. On the other hand, British and French warships refused to take political refugees in Chile, in 1892. The French Decree of May 20, 1885, which is still in force, provides that in the case of disturbances in a foreign country the Captain must be extremely vigilant to prevent refugees on board from communicating with their associates ashore. It further provides that refugees should be put ashore in a place of safety as soon as circumstances permit. Maritime asylum used to be of great importance in the case of fugitive slaves. Nowadays, the Universal Declaration of Human Rights, following upon the Slavery Convention of 1926 and the *Acte Général* of the Brussels Conference of 1890, lays down that slaves who take refuge on warships are at once and finally liberated from slavery. This declaration has been approved by all civilised countries.

Conclusion

This brief study of a subject which needs to be examined at great length leads us to the view that the right of asylum is no longer an end in itself. It is a means enabling human beings to escape from a life which they consider intolerable and to give them a chance to create for themselves a new life. Protection of refugees is therefore only a particular aspect of the protection of human beings. It seems to me appropriate that today we have had the opportunity to consider together the problem of the right of asylum as one of the methods which international law affords to strengthen the protection of mankind and fundamental freedoms, which is the essential concern of us all.

BOOK REVIEWS

The Law of International Institutions. By D. W. Bowett. (London: Stevens & Sons, 1963, 347 pp. 52s.6d.)

This book, published under the auspices of the London Institute of World Affairs, marks another step in the development of a new offshoot of international law; it is an introductory textbook for the teaching of the Law of International Organizations at Universities, a subject in which the author has considerable teaching and practical experience.

Indeed, prominent international lawyers have often emphasized recently the spectacular development of international organizations in our century. From their very modest beginnings fifty years ago, mainly as international unions for technical purposes like postal services, and the protection of industrial property and copyright, international organizations were given either a small chapter or an appendix in general treatises on international law. Today they are the embodiment of efforts to reconcile the continuing existence of State sovereignty and the inevitable need for growing cooperation and integration of States in higher international units. The task which lies ahead of providing prosperity, culture and freedom for mankind is so vast that combined effort within the framework of international organizations has become essential. Accordingly, the development of international organizations is leading mankind towards the goal of world-wide cooperation. On this road, the essential purpose of the organized society of States must be, as *Oppenheim* puts it, to secure the freedom of the individual in all its aspects, by means of comprehensive and enforceable obligations binding upon the members of the Organization. In other words this means the application of the Rule of Law on a world scale.

The book sets out to give an overall view of the present state of international organizations and to chart for the student and other interested readers their amazing complexity. Its scope is limited to international inter-governmental organizations. The many thousands of international non-governmental organizations (NGOs) are mentioned only as far as their activities contribute essentially to the performance of the functions of the former.

Institutions are classified in two ways: according to *function*, general and special organizations, and according to *territorial competence*, global and regional organizations.

The combination of these two criteria divides the subject-matter into (I) Global, (II) Regional, (III) Judicial Institutions and (IV) Common Institutional Problems.

The first two chapters give a historical outline of the early attempts to organize international intercourse between States on a permanent basis. This begins at the Congress of Vienna in 1815, and ends at the dissolution of the League of Nations in 1946.

Chapter 7 is a description and appraisal of the United Nations within the compass of 70 pages. The U.N. is seen as a "collective security system far more centralized than the League", providing "special forms of cooperation between sovereign States, supplementing the traditional methods of inter-State intercourse and extending into fields of social and economic affairs, which lie outside a system of collective security . . ." (p. 22). It is built on the voluntary cooperation of the members, and binding enforcement measures of the Security Council are limited to cases which involve the maintenance of international peace and security. Concerning Article 2(7) of the Charter, excluding from U.N. competence matters essentially within the domestic jurisdiction of Member States, the author is clearly for a fairly restrictive interpretation: "a matter which becomes serious enough to threaten international peace and security would *ipso facto* cease to be essentially 'domestic'; further, where a State has assumed treaty obligations with respect to a certain matter it can no longer maintain that the matter is exclusively within the domestic jurisdiction". The record of disappointing refusals on the part of Governments to recognize U.N. competence in cases which according to the Security Council or the General Assembly threatened international peace leads the author to the realistic observation that "the application of the Article is more a matter for political judgments than legal interpretation" (p. 23).

The chapter brings out clearly the limitations of the collective security systems of the U.N., based originally on the presumed unanimity of the five great powers qualified as permanent members of the Security Council. Article 27(3) requires the "concurrent votes of the permanent members" to take a decision, and though there is a proviso embodying the general principle of law "*nemo iudex in sua causa*", permanent members are not restricted by this clause and may veto Security Council action even in a case of their own aggression.

The chapters giving a description of the United Nations as a coordinator of activities of varied international organizations which perform the task of international administrations and the sections dealing with the problems of international civil service are excellent.

In Chapter 3 the role of the Economic and Social Council is dealt with, Chapter 4 lists the specialized agencies, and makes a comparative survey of the institutional provisions of these agencies, together with an analysis of the U.N. Secretariat. Finally, Part Four of the book deals with common institutional problems of international organizations. These parts show the author at his best in the

difficult art of combining lucidity with brevity; his experiences gained at the United Nations Office of Legal Affairs and in teaching are fruitfully combined. Here are neither bare nor dry bones; the comments and generalizations give the reader the flesh and blood of these organizations.

Some would wish for an account of the activities of the United Nations concerning the safeguarding of human rights. Though the Draft Covenants of the U.N. Commission on Human Rights are still in their seemingly interminable draft stage, they might be included in a comprehensive treatise. If, as is perfectly proper, the author purposely confines himself to existing international machinery, the omission is logical enough. Thus the efforts to safeguard human rights on the regional level receive their due place. The European Commission on Human Rights and the pioneering European Court of Human Rights are naturally enough covered, but in addition attempts to establish similar regional Conventions on Human Rights, as proposed by the African Conference on the Rule of Law, held under the auspices of the International Commission of Jurists in January 1961, are also presented. Why not, then, the attempts by the U.N.?

It may be added that in the reviewer's opinion regional East European organizations do not receive their due. Formed in response to the challenge of similar Western European organizations, they have received since 1961 a remarkable boost, and more attention might have been given to them than a brief mention.

This is an excellent, readable book, and a distinguished addition, No. 60, to the publishers' series, *The Library of World Affairs*.

JÁNOS TÓTH

Changing Law in Developing Countries. Edited by J. N. D. Anderson. (London: George Allen and Unwin Ltd, 1963, 269 pp. 35s.)

This book is the second in a series of publications by George Allen and Unwin under the caption "Studies on Modern Asia and Africa". It reproduces a number of lectures delivered at the School of Oriental and African Studies during the academic years 1961-62 under the same general title as that of the book, viz., "Changing Law in Developing Countries". Two further papers have also been added to make the publication 'reach a wider audience'.

There are fourteen contributions in all. Though linked under the same general title, each deals with a distinct topic. The contribution of the editor, who is Professor of Oriental Laws and Head of the School of Oriental and African Studies in the University of

London (S.O.A.S.), is an excellent paper on "Islamic Law in Africa: Problems of Today and Tomorrow" (Chapter 9).

Three lectures by Sir Kenneth Roberts-Wray, former legal adviser to both the Colonial Office and the Commonwealth Relations Office, on "The Authority of the United Kingdom in Dependent Territories", "The Legal Machinery for the Transition from Dependence to Independence", and "The Independence of the Judiciary in Commonwealth Countries" are reproduced as Chapters 1, 3 and 4 respectively. Sir Kenneth's successor at the Colonial Office, Mr. J. C. McPetrie, has contributed a "Survey of Constitutions drafted at the Colonial Office since 1944" (Chapter 2). The other contributions are "Fundamental Rights" by Professor A. Gledhill, Professor (now Emeritus) of Oriental Laws in the University of London (Chapter 5), "Constitutional Writs in India" by Sir Orby Mootham, former Chief Justice, Allahabad High Court (Chapter 6), "Justice, Equity and Good Conscience" by Dr. J. Duncan M. Derrett, Reader in Oriental Laws, S.O.A.S. (Chapter 7), "The Legal Profession in African Territories" by Sir Sydney Littlewood, President, The Law Society, 1959-60 (Chapter 8), "Liability under the Nigeria Criminal Code: A Historical and Comparative Study" by the late Dr. R. Y. Hedges, former Chief Justice, Western Region of Nigeria (Chapter 10), "Legal and Economic Growth in Africa" by Dr. A. N. Allott, Reader in African Law at the S.O.A.S. (Chapter 11), "Women's Status and Law Reform" by J. S. Read, then Lecturer in African Law, S.O.A.S. and now Senior Lecturer in Law, University College of Tanganyika, (Chapter 12), "Islamic Family Law: Progress in Pakistan" by N. J. Coulson, Lecturer in Islamic Law at the S.O.A.S. (Chapter 13), and "Chinese Law in Hong Kong: The Choice of Sources" by H. McAleavy, now Reader in Oriental Laws at the same School (Chapter 14).

It is not proposed, for reasons of space, to make detailed comments on each of these Chapters. Suffice it to say that although the Chapters differ widely one from the other in style and approach as they necessarily must, the background, calibre and experience in their particular fields of the contributors have ensured the high standard of scholarship and the masterly treatment of subject-matter that is evident in every chapter.

Being in their nature papers read out in the form of lectures within a limited space of time, it was naturally impossible for the lecturers to deal with their respective topics as exhaustively as they might otherwise have done. Nevertheless, a successful effort has been made in every contribution, while presenting a general sketch, to stimulate real interest in and sufficient appreciation of the topic dealt with by reference to details and illustrations wherever necessary.

Chapters 1 to 3, which survey constitutional developments in

the British Commonwealth, Chapter 4, which deals with the independence of the Judiciary in Commonwealth countries, and Chapter 6, which deals with constitutional writs in India, might well have been separately published, together with additional contributions on Commonwealth institutions and developments, under a somewhat different title.

Chapter 5 takes a brief glance at the early attempts to formulate fundamental rights beginning with the Magna Carta and then deals with the Universal Declaration of Human Rights and the Rome Convention for the Protection of Human Rights. Special reference is made to the guarantees of fundamental rights enshrined in the Constitutions of the U.S.A., France, Japan and India.

Chapter 8 throws out some suggestions for ensuring that the legal profession in African territories is adequately equipped to handle the complex legal problems of modern Africa, and these suggestions, coming as they do from the President of the Law Society, must doubtless carry great weight.

Chapters 9 and 13 deal with Islamic Law in Africa and Pakistan respectively, the problems of reform and the extent to which reform has been achieved, having regard to the conflict between the insistence on adherence to strict principles of the Koran on the one hand and the needs of changing society on the other.

Chapter 11 examines through the medium of three case studies, namely (a) Land Law, (b) Credit and (c) the Encouragement of Foreign Investment, the legal implications of economic development in Africa and the extent to which the law can either act as a brake on economic progress or stimulate such progress. Special mention must be made of an interesting section in this Chapter on "The Role of the Lawyer". Here Dr. Allott postulates that it is the duty of lawyers in a developing society to associate themselves with the examination of existing law and the exploration of new structures to replace it.

Chapter 12, though carrying the general title "Women's Status and Law Reform", focuses attention on Africa.

The last chapter is an interesting examination of the confused state of Chinese law in Hong Kong today. The author points out that in the Chinese law and custom of 1843, which is the starting point of Chinese law in colonial Hong Kong, there were a number of matters regarding which Chinese statute law laid down one rule, whilst custom, followed by the great mass of the people, persisted in another. The important question as to which of the two, custom or statute, ought to be recognized by the Hong Kong courts yet remained unanswered.

One criticism of the book that must be made is the choice of its title. It is true that it was the general title under which guest lecturers and staff members of the School of Oriental and African

Studies delivered a series of lectures and which was carried over to the book itself. But whatever the reason for the choice of title may be, the title is apt to create an incorrect impression of the contents. From its title one would expect the book to be a treatise on how the indigenous laws of various developing countries, customary or otherwise, were subjected to the processes of change by legislation and by judicial interpretation and, in the constitutional aspect, how new constitutions or amendments to existing constitutions in these countries have resulted in a greater measure of political and personal freedom and to include an attempt to discover, whenever possible, a general pattern or patterns of change in these countries.

In a work on *Changing Law in Developing Countries* one would expect more attention paid to how changes in law had been effected through the application by judges and lawyers of Rule of Law and natural law principles in their respective fields of work. Conversely, one would not expect such exhaustive treatment of questions not quite pertaining to changing laws in developing countries.

Thus, although the learned paper by Dr. Derrett on "Justice, Equity and Good Conscience" has two short sections dealing with the impact of this formula on the customary laws of India and Africa, the emphasis is on the Romano-Canonical origins of the formula. Again, the Chapter on the Nigerian Criminal Code, having explained that the Code follows the Queensland model, proceeds to deal with general principles of liability and general exceptions under the Code.

The comments made above should not be construed as detracting in any way from the excellence of the papers. Though when viewed from the standpoint of the rather extravagant title there are lacunae, each individual contribution represents a masterly handling of a particular topic within the compass of an essay; and when viewed from the standpoint of these contributions, the publication is both fascinating and stimulating.

LUCIAN G. WEERAMANTRY

Soviet Administrative Legality, The Role of the Attorney General's Office. By Glenn G. Morgan. (Stanford, California: Stanford University Press, 1962, 281 pp., \$ 6.00).

Readers of this *Journal* will be acquainted with the article by Professor Morgan in Vol. II, No. 2, on "The 'General Supervision' of the Soviet Procuracy". The results of his research on this subject were later elaborated in a doctoral dissertation, on which the book under review is based.

In the Preface the author rightly points out that his study is a direct product of the increased attention paid to Soviet studies. Book-reviews in this *Journal* of the textbook of Professors Hazard and Shapiro as well as of the issues of *Law in Eastern Europe* (Vol. IV,

No. 2) have already dealt with some aspects of Soviet legal reform and with the efforts aimed at raising the level of Socialist Legality. In the quest of Western comparative legal science to assess correctly the concept of Socialist Legality, Morgan's work is a useful contribution. It concentrates on a special institution of the Soviet legal system designed to assure the observance of legality.

Article 113 of the 1936 Soviet Constitution provided that "supreme supervision over the strict execution of the law by all ministries and establishments subordinated to them, as well as by individual officials and also citizens of the USSR, is vested in the Procurator of the USSR" (later renamed the Procurator General). This Article incorporated in the latest Constitution an institution established in 1922 by the Soviet leaders with the specific purpose of supervising the observance of laws by all organizations, officials and citizens. There is a continuing debate among Western scholars on Soviet law whether Soviet law is unique, as their own proponents claim it to be, but be this as it may, there is no doubt about the uniqueness of the institution of the Soviet type of procuracy. Besides being responsible for the prosecution of criminal cases, like the *parquet* in Continental Europe, the Procuracy also serves as a watchdog of legality in every field of life. Parallels drawn in the Introduction with the institution of the *Ombudsman* in Scandinavian countries and elsewhere are to be read with caution, since in spite of similarities in functions performed, the organization of the two institutions is basically different, as is noted also by the author.

Part One of this book is a history of institutions for general supervision. Soviet leaders when building up their new social order used many social institutions taken from the heritage of Imperial Russia. The origin of the Procuracy is traced back to an edict of Peter the Great in 1711. Re-established in Soviet Russia in 1922 it was used to achieve a greater measure of revolutionary legality, as required by the circumstances of the NEP policy launched at that time. Preliminary discussions, draft decrees, and the stand of the Party's Central Committee and of Lenin himself concerning the Procuracy are scrutinized; the adoption of the decree with the eventual organization of the institution are analysed and evaluated. The author then follows the activity of Soviet Procuracy through the ups and downs of Soviet Party history. From 1929 on an abeyance is observed, the institution being more and more transformed into a political arm of the Government to check on the execution of the Laws decreeing forced industrialisation and collectivization of agriculture. The thorough implementation of these Laws was considered more important than bothering with claims based on infringements of personal rights. It is interesting to study the reorganization of the Procuracy in 1933 and 1934, when powers of general supervision were reduced and prosecution of persons impeding (or

thought to be impeding) the execution of Party policy came to the fore. It has to be remembered that this was the period of the great purge. A contemporary analysis in 1936 marks the low point to which Soviet Procuracy had sunk: "Procurators in the localities and also in the central Procuracy agencies quite often do not note gross violations of Soviet laws that are committed next to them" (at p. 94).

From 1936, continuous and reiterated efforts are observed, first to resume and then to improve the task of general supervision. These efforts received a strong impetus with Stalin's death and led to a reorganization with the Statute of 1955, which became the Charter of the Procuracy. Summing up his historical survey the author notes that the Procuracy in exercising general supervision had apparently passed from utter neglect of its functions to carrying them out on a regular basis at all levels (p. 129). His assessment of this development is sound – a clear improvement on the road to legality, but within restricted limits.

Part Two deals with general supervision today. It tries to define the concept and jurisdiction of general supervision, widely debated in Soviet legal literature, and dissects prevailing confusion on the matter. It is stated, citing Berezovskaya, that the jurisdiction of the Procuracy in the exercise of general supervision extends to all ministries and departments including the Committee of State Security, the KGB. Unfortunately, the relation between Procuracy and the Soviet secret police is not examined. As the author states, Soviet sources are lacking on this subject.

In the last two chapters the methods used by the Procuracy and the actions available to it are listed in Soviet practice surveyed up to 1961.

The author gives a telling final evaluation of the institution, paraphrasing Muraviev, a 19th-century Russian scholar who criticized the Tsarist Procuracy. "The basic weakness of the old Procuracy from the standpoint of Western law and democratic practices is a fundamental one of the Soviet institution: the use of one group of appointed officials to watch over the activities of the rest of the bureaucracy." It is evident that the Procuracy cannot be a substitute for administrative and constitutional courts. The book finally mentions the awakening of interest in Soviet legal literature in efficient *judicial* guarantees of legality and underlines at the same time the ambivalence even of judicial guarantees in the absence of an independent judiciary.

Richly documented from original Soviet sources and written in an easily readable style, this book gives a balanced historical outline of the function of Soviet Procuracy in the field of 'general supervision'.

J.T.

Le Régime juridique des étrangers en France. By Alphonse Romeu-Poblet. [Angoulême: Editions Coquemard, 1961, 355 pp.]

Monsieur Alphonse Romeu-Poblet, who has the advantage of having studied law in both France and Spain, is the author of several works on International Law and on Comparative Law. His book on the *Régime juridique des étrangers en France* (The Law Relating to Aliens in France) sets out very fully the many and complex legislative provisions, legislation enacted both by Parliament and the Administration, relating on the one hand to the entry and residence in France of foreign nationals and on the other to various aspects of their rights in relation to obtaining work and bringing their families. Shortly after the second World War the law relating to aliens was consolidated, and to this day *ordonnance* No. 45-2658 is the basis of the law relating to aliens in France. But the implementation of this *ordonnance* in spheres where there is special legislation has called for special provisions. Additional provisions have been necessary to deal with the circumstances in which aliens may be permitted to follow occupations in agriculture, industry, crafts and trade and their special rights, such as in respect of rural leases and tenant farming. The author's work is useful in that it collects for ready reference the relevant provisions relating to aliens. In addition, he rightly draws attention to Articles 42, 48 and 59 of the Treaty of Rome of March 25, 1957 which will, as the various stages in the development of the Common Market are reached, have a profound effect on the right of foreigners to follow their occupations anywhere in the European Economic Community.

The author also deals with several topics which in his view are closely linked with the immediate subject-matter of his work. One chapter is devoted to French nationality law and reproduces the *ordonnance* of October 19, 1945, setting out the law on French nationality, and adds some practical comments of his own. Another chapter deals with the right of asylum from two points of view, that of International Law (the Convention of July 28, 1951, on refugees) and of Municipal Law (the Act of July 25, 1952, and the Decree of May 2, 1953, on the French Office for the protection of refugees and stateless persons).

It would seem that the author's intention was to aim mainly at the Spanish nationals living in France. This would explain his inclusion of the Franco-Spanish Conventions and even of the provisions of Spanish law which are set out in the original Spanish. In any event, this treatment of the subject by the author unfortunately aggravates the confused impression left by several chapters. It is also difficult to see why in the chapter on the right of asylum provisions of the Geneva Convention on refugees are repeated twice and

occasionally three times. It may well be that these lapses are due to the author's putting the book together with a little too much haste.

PHILIPPE COMTE

The Legal Aspects of the Hungarian Question. By Joseph Alexander Szikszoy. [(Thesis submitted to the Graduate Institute of International Studies, University of Geneva.) France: Imprimerie Les Presses de Savoie, Ambilly-Annemasse, 1963, 219 pp.]

The dramatic events in Hungary, starting on October 23, 1956, had a broad impact and stirred public opinion all around the world. Different bodies of the United Nations were seized of what was later called the Hungarian Question from October 1956 to the end of 1962. The Emergency Session of the General Assembly voted on November 4, 1956, resolution 1004(ES-II), the text of which reads:

The General Assembly. . .
Taking note of the radio appeal of Prime Minister Imre Nagy of November 4, 1956,
Calls upon the Government of the USSR to desist forthwith from all attacks upon the people of Hungary and from any intervention, in particular armed intervention in the internal affairs of Hungary;
Affirms the right of the Hungarian people to a government responsive to its national aspirations and dedicated to its independence and well-being; . . .

The International Commission of Jurists held a conference at The Hague in March 1957 and published its findings in a special report *The Hungarian Situation and the Rule of Law*, and subsequently published three supplements (1957, 1958). The Report stated that events in Hungary challenged the basic legal principles for which the Commission stands, and set out relevant texts and documents on the international and above all human rights aspects of the popular uprising and of the repression which followed when it was crushed. Until the publication of the work under review, however, there was no work giving a complete account of all the legal aspects of the events in Hungary. The book has a special importance now that the question has been in effect removed from the agenda of the United Nations by a resolution of the General Assembly in 1962, terminating the mission of the United Nations Representative on the Question of Hungary. The detailed legal analysis undertaken by the author marks the beginning of the incorporation of this contemporary political problem into its legal setting.

The First Part, in one chapter, outlines the scope of the problem. A short summary of events is followed by three official interpretations of what happened: the assessment by the United Nations General Assembly, the official version of the "Revolutionary Workers' Peasants' Government" in Hungary, headed by János

Kádár, and the position of the Government of the USSR. While the General Assembly of the United Nations found that the legitimate Nagy Government was overthrown by a massive Soviet armed intervention, the Soviet and the Kádár Governments maintained that such intervention by Soviet troops stationed in Hungary under the terms of the Warsaw Treaty occurred at the request of the lawful Kádár Government. In order to resolve the principal issues involved, the book deals with its subject from three aspects, namely:

- 1) Hungarian constitutional law (in order to consider the legality of the subsequent governments in Hungary);
- 2) international law in general (to assess the legality of the Soviet intervention);
- 3) the law of the United Nations (to show how far the United Nations has been able to fulfil its task of maintaining peace in Hungary and to "establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained".)

1) The basic asset of the work is the extensive study of Hungarian constitutional law in order to assess the legality of events which occurred in the period from October 23, 1956, to May 27, 1957 (Second Part, Chs. 2, 3.) Well-documented material and persuasive arguments bring the author to his first point. In his view the events in Hungary do not qualify as a revolution, in spite of the fact that they brought about great changes in substantive Hungarian municipal law (introduction of the multi-party system instead of one-party rule). The Nagy Government came into power under turbulent circumstances, the first Soviet intervention and the ensuing popular uprising, but according to the valid provisions of the Constitution of 1949. It was recognized internationally, even by the Soviet Government. The break in Hungarian constitutionality came with the overthrow of the internationally recognized and legal Hungarian Government by the second Soviet armed intervention on November 4, 1956. The new Government, formed on the 3rd or 4th of November somewhere in territory occupied by the Soviet army, under Soviet jurisdiction, could not but be qualified at the time of its formation as a government-in-exile. The Presidential Council attempted to legalize its existence *ex post facto* in November by Decree No. 26 of 1956 under the name of "Revolutionary Workers' Peasants' Government". The author shows that in this case a "new government was appointed under a new name which bore no relation either to the Constitution in force or to any previous constitutional practice. . . . With its illegal title the new government was further conferred by the Presidential Council an exclusive authority over all governmental functions through the

power of discretionary appointment of those who will be in charge of individual ministries", a right expressly reserved by the Constitution for the National Assembly or the Presidential Council. These violations of the Constitution led, in the author's view, to its suspension. Indeed, Hungary remained for months under the effective control of the Soviet armed forces.

Constitutionality was restored by an "Amendment of the Constitution", passed by the Hungarian National Assembly on May 22, 1957, whereby the Hungarian Workers' Peasants' Government was declared the highest organ of State administration, and its existence was legalized. The same session duly elected the Government of Mr. Kádár to be the legal successor of the Nagy Government. From that date the formal legality of the new Hungarian Government appears to be unobjectionable. The book, following a strictly positivist approach to legality, does not consider how far this Government conformed to the requirement stated by the General Assembly resolution quoted above, according to which the Hungarian people has a right to a "government responsive to its national aspirations and dedicated to its independence and well-being", an essentially political assessment. The legal status of the Soviet armed forces in Hungary was also regulated at that time by a bilateral international agreement, on May 27, 1957. The coincidence of the dates of the constitutional amendment and the bilateral treaty affords strong support for the assertion that Soviet armed forces, having established effective control of Hungarian territory in November 1956, relinquished control progressively as the Kádár Government gradually consolidated its power, assumed control over the territory and ripened into a legal government.

2) The legality of Soviet interventions in the internal affairs of Hungary is examined under the rules of international law. (Second Part, Chs. 4, 5, 6, and 10).

The author tests the legality of the first Soviet intervention of October 23 in the light of a Hungarian thesis advanced on the occasion of the Cuban crisis. This opinion, based on the Soviet concept of peaceful co-existence, unconditionally excludes any right of intervention. Present international law, so the Hungarian argument runs, acknowledges the right of every nation not only to change the form and system of its government, or its socio-economic structure, but even to overthrow a government by armed revolution if need be. It prohibits any kind of intervention under any pretext, holding that intervention is a breach of international peace. On the basis of this tenet the first Soviet intervention was illegal. The Government of Hungary, before the second Soviet intervention, endeavoured to settle peacefully the controversial problem of the presence of Soviet troops and to achieve a negotiated withdrawal of

these troops. The Soviet Government Declaration of October 30, 1956, opened the way for such negotiations, which indeed were pursued until the Soviet arrest of the Hungarian delegation on November 4, and, then the attack of the Soviet army overthrew the Hungarian Government.

The much-debated problem whether the Warsaw Treaty applied to the Hungarian events is answered by a clear negative. Quoting Polish Professor Gelberg, the author holds that it was not applicable but for different reasons. According to him, Soviet action made it impossible for the Hungarian Government to perform its treaty obligations. The Soviet Army, bound by the Warsaw Treaty to help Hungary against outside attack, itself made preparations to attack Hungary. Hence, runs the argument of the author, the treaty became inoperative between the USSR and the Hungarian People's Republic. Thus, when on November 1, Prime Minister Nagy declared the withdrawal of Hungary from the treaty, there was nothing left to be repudiated and the announcement was in fact merely declaratory. The second Soviet intervention is qualified as an undeclared war on Hungary, during which, according to official Hungarian data published in 1957, there were casualties of 2,700 dead and 20,000 injured; there were also more than 190,000 refugees. Soviet losses were never made public.

The abduction of Prime Minister Imre Nagy and his associates by Soviet authorities when they left the Yugoslav Embassy in Budapest is discussed as a "third intervention" in the internal and foreign relations of Hungary, since it voided an agreement for safe-conduct negotiated with Yugoslavia (Ch. 6). It is shown that the asylum which Nagy and his associates allegedly sought from Rumania cannot be qualified as such, but should be assimilated to deportation.

The recognition of the Kádár Government (Ch. 10) leads the author to interesting speculations centered around the Estrada doctrine. The use of this doctrine in the present case, seems, however, to be far-fetched.

3) The third part of the book is a United Nations case-study (Chs. 7, 8, 9, 10/15.)

The outcome of this study is very depressing. Because of imperfections of the Charter, abundantly exploited by Member States, "the legal aspects of the Hungarian Question gained only vague verbal expression", states the author.

The basic imperfection is identified as a contradiction between Article 2 (4) of the Charter, which permits the Security Council to take action against those who violate this clause by breaking international peace, and the rule in Article 27(3), the so-called veto-right, which prohibits action contemplated on any grounds whatsoever in the case of non-concurrence by one of the permanent Mem-

bers of the Council. Because of the Soviet veto the Security Council failed to adopt one single resolution which might have had positive legal value in coping with an issue properly under its jurisdiction. Some marginal implications were left only; among these the author gives a detailed analysis of the relevant General Assembly resolutions (Ch. 8). These resolutions qualified Soviet action against Hungary as "aggression" or even "war". The legal value of General Assembly resolutions is, on the other hand, highly questionable. There is a general consensus among international lawyers that such resolutions, even if adopted by the required majority, as in the case of the condemnation of Soviet intervention, would still not have binding legal force. Finally the problem of credentials of the Hungarian UN representatives is discussed (Ch. 10/5). The fact that the United Nations did not take decisions for years concerning these credentials is said to constitute a unique practice, by which the United Nations expressed its displeasure at the disregard of its resolutions, and "defined such legal situations which it cannot regulate in substance".

To conclude this review some general remarks remain to be made on both the book and its subject.

The author, in de-ideologizing an important contemporary issue by a positivist legal approach, achieves a remarkably high degree of objectivity; his work is a clear and outspoken analysis of a highly controversial question. The book, taking into account a few weak spots, contained mainly in the last chapter, will remain for a long time the basic and authoritative treatise on the case.

The Hungarian Question constituted an exemplary setback to the international rule of law. In the field of municipal law it shows the unique case of a revolution observing constitutional requirements. In the field of international law it is another forceful example of the failure of law when confronted with the use of naked force.

The Hungarian Government of Mr. Nagy used the classical means of bilateral negotiations to settle controversial problems, and it did not hesitate to refer to the most progressive rule of international law: to ask for collective international protection in face of the threat of armed intervention. The case study of the United Nations action showed the regrettable incapacity of that organization when the great powers are in disagreement to act to protect the international rule of law.

J. T.

Der Strafkodex der Ungarischen Volksrepublik, V. Gesetz vom Jahre 1961 über das Strafgesetzbuch und die wichtigsten Vorschriften des Einführungsgesetzes und der Durchführungsverordnungen. In deutscher Übersetzung mit Erläuterungen und mit einer Einführung. (Criminal Code of the Hungarian

People's Republic, Law No. 5 of 1961 concerning the Criminal Code, with the most important provisions of the Law bringing the Code into effect and Decrees on its implementation. Translated into German with comments and an introduction by Dr. Ladislaus Mezöfy.) Berlin: Walter de Gruyter & Co, 1964, xii & 135 pp.]

This book appeared as No. 83 in the collection of foreign criminal codes in German translation, a series edited by the well-known German criminologists Professors Jescheck and Kielwein. This collection, amounting today to a small library, is designed to present in a concise and easily accessible form the criminal codes and codes of criminal procedure of the countries of the world. The preface introducing the text gives a general outline of the features of the code and the basic history of its enactment. Such a presentation provides the necessary basis for the use of the text without offering the detailed analysis and evaluation of a voluminous treatise.

The present volume also includes the most important parts of decrees related to the Code, pertaining to its implementation and application. This makes available for the foreign jurist important material not easily accessible otherwise without a knowledge of Hungarian.

Corvina, the Hungarian Foreign Languages Publishing House in Budapest, has published translations of the Hungarian Criminal Code in foreign languages. The French edition of 1962 includes the text of the Code, the Report of the Ministry of Justice to the National Assembly on the Bill, and the speech delivered before the National Assembly by the Minister of Justice moving its adoption. This arrangement presents the official view of the Government on the Code.

A book review is not the place to embark on an over-all evaluation and criminological analysis of this remarkable Code. Suffice it to draw attention to some of its most interesting aspects, relying on the two publications mentioned above.

The Hungarian Criminal Code should be seen as another product of the work of codification pursued in Hungary with a view to providing (on the basis of the Soviet-type Constitution of 1949) a codified Socialist (i.e., Communist) legal system. It was appraised as the first Hungarian criminal code based on the principles of Marxism-Leninism, the provisions of which have been moulded by and for a socialist society. The cornerstones of the Code are the first two Articles. Article 1 proclaims the task for the Code to be the protection of the State order of the Hungarian People's Republic (including its social and economic system), as well as the safe-

guarding of the rights of its citizens. Article 2 defines the concept of an offence by adapting the Soviet theory of "social danger". Accordingly an offence is defined as an act involving social danger and for which the law foresees punishment. An act involving social danger is any action or default violating or endangering State order or the rights of the citizen.

From Mezöfy's introduction the Code emerges as the product of two trends. One is Soviet influence. The other the wish of Hungarian criminologists to apply Marxist-Leninist legal theory to Hungarian circumstances and to give a special Hungarian character to the Code. Soviet influence inspires the whole legal framework in which the Code is set; moreover, the impact of changes in Soviet penal policy can also be discerned.

Though preparatory works for codification were started in 1953, they got into full swing only after 1957. At that time Soviet criminologists were working on their criminal law reform which was enacted as the "Fundamental Principles of Criminal Law" in 1958. This reform introduced standard principles of criminal law like *nullum crimen sine lege, nulla poena sine lege*, in order to eliminate what were termed "grave violations of Socialist Legality" of the previous period. Authors of the draft Bill of the Hungarian Code used the possibilities offered by a more liberal penal policy in the Soviet Union, diminished the number of anti-State crimes, mitigated some severe punishments, eliminated the duty of relatives to report to the police against family-members suspected of offences, abolished capital punishment generally for economic crimes and preserved provisions of the former Hungarian Criminal Code of 1878 wherever it seemed appropriate. In 1961 Soviet penal policy switched again towards a more severe line, as shown particularly by the broadened application of the death penalty to combat economic crimes. Some of these new provisions, including the alternative application of the death penalty for economic crimes, were included in the final text of the Code.

The Code remained, nevertheless, a text drafted in a clear style, easily understandable, well-proportioned and taking into consideration many requirements of modern criminology.

The reviewer would wish, in conclusion, to draw attention to the meticulous care and professional skill of the translator in performing his task and his ability to present the Code in the context of former criminal legislation in Hungary. This historical perspective is due to his mastery of the material in question: he published in the same collection a compilation of Hungarian criminal legislation in force before the codification [Cf. Book review in this *Journal*, Vol. III, No. 1, (1961)].

J. T.

BOOKS RECEIVED

Inclusion in this list does not preclude subsequent review.

- American Enterprise and Scandinavian Antitrust Law.** By E. ERNEST GOLDSTEIN. (The University of Texas Press. 1963. 391 pp. \$ 6.50)
- Commentaries on the Constitution of India.** By DURGA DAS BASU. (Calcutta: Sarkar & Sons (P) Ltd. 1963. 790 pp. £4)
- The Constitution and Government of Ghana (Law in Africa, No. I).** By LESLIE RUBIN and PAULI MURRAY. (London: Sweet & Maxwell. 1961. 326 pp. 34s.)
- Les Contrats entre époux.** By PIERRE JULIEN. (Paris: Librairie Générale de Droit et de Jurisprudence. 1962. Tome XXXII, 232 pp. Fr. 27.00)
- The Death Penalty in America.** Edited by HUGO A. BEDAN. (Doubleday & Company, Inc. 1964. 584 pp. \$1.95)
- Elections in Northern Rhodesia, 1962.** By DAVID C. MULFORD. (Nairobi: Oxford University Press, and Oxford: the Institute of Commonwealth Studies. 1964. 205 pp.)
- La Fonction publique internationale.** By GEORGES LANGROD. (Leyden: Sijthoff. 1963. 387 pp. Fl. 39.90)
- Freedom of the Press in India, Constitutional Provisions and their Application.** By JOSEPH MINATTUR. (The Hague: Martinus Nijhoff. 1961. 150 pp. Fl. 15.00)
- Fundamentals of Soviet Law.** By P. S. ROMASHKIN. Moscow: Foreign Languages Publishing House. 517 pp. Fr. 7.70)
- God and Caesar in East Germany.** By RICHARD W. SOLBERG. (New York: The Macmillan Company. 1961. 294 pp. \$4.95)
- International Law and the Use of Force by States.** By IAN BROWNLIE. (Oxford University Press. 1963. 436 pp. 75s.)
- Jurisprudence, Realism in Theory and Practice.** By KARL N. LLEWELLYN. (The University of Chicago Press. 1962. 539 pp. \$8.95)

- Martial Law in India and Ceylon.** By JOSEPH MINATTUR. (The Hague: Martinus Nijhoff. 1962. 93 pp. Fl. 1.50)
- Mélanges en l'honneur de Jean Dabin.** Edited by EMILE BRUY-LANT. (Paris: Sirey. 1963. Tomes I. et II. 410 pp. et 967 pp.)
- De la nature juridique du partage d'ascendant.** By ANDRE PELLEGRIN. (Paris: Librairie Générale de Droit et de Jurisprudence. 353 pp.)
- La notion de cessation des paiements dans la faillite et le règlement judiciaire.** By GILBERT GRANCHET. (Paris: publié sous la direction de Henri Solus. 1962 Tome XXXV, 235 pp. Fr. 25.00)
- Essai sur la notion de caducité des actes juridiques en droit civil.** By YVAINE BUFFELAN-LANORE. (Paris: Librairie Générale de Droit et de Jurisprudence. 1963. 176 pp. Fr. 22.00)
- La notion d'erreur dans le droit positif actuel.** By JACQUES GHESTIN. (Paris: Librairie Générale de Droit et de Jurisprudence. 1963. 371 pp. Fr. 45.00)
- La notion d'obligation de garantie dans le droit des contrats.** By BERNARD GROSS. (Paris: Librairie Générale de Droit et de Jurisprudence. 1964. 364 pp. Fr. 42.40)
- New Elements in the Development of Socialist Constitutions.** By ISTVAN KOVACS. (Budapest: Hungarian Academy of Sciences. 1962. 442 pp. DM. 18.90)
- The New Face of Soviet Totalitarianism.** By ADAM B. ULAM. (Harvard University Press. 1963. 233 pp. \$4.95)
- L'obligation de garantie dans le louage de choses.** By JEAN-PIERRE LE GALL. (Paris: publié sous la direction de Henri Solus, Librairie Générale de Droit et de Jurisprudence. 1962. Tome XXXVI, 455 pp. Fr. 52.40)
- The Organization of American States.** By ANN VAN WYNEN THOMAS and A. J. THOMAS, Jr. (Dallas: Southern Methodist University Press. 1963. 530 pp. \$10.00)
- Poland 1944-1962. The Socialization of a Captive People.** By RICHARD F. STAAR. (Louisiana State University Press. 1961. 300 pp. \$2.50)

- The Powers of Government, a Commentary on the Constitution of the United States.** By BERNARD SCHWARTZ. (New York: The Macmillan Company. 1962. Parts I, II, 470 pp., 497 pp. \$12.50 each)
- Probation and Mental Treatment.** By MAX GRÜNHUT. (The Institute for Study and Treatment of Delinquency. 1963. 56 pp.)
- Professional Secrecy and the Journalist – IPI Survey No. 6.** IPI SURVEY. (Zurich: International Press Institute. 1962. 237 pp. SFr. 10.00)
- The Prospect of International Adjudication.** By WILFRED JENKS. (London: Stevens Oceana. 1964. 845 pp. £6. 17s. 6d.)
- Rechtserlebnis und Rechtspflege. Ein Fussweg zur Jurisprudenz, für ungeübte begehbar.** By ALOIS TROLLER. (Frankfurt/M, Berlin: Alfred Metzner Verlag. 1962. 122 pp. DM: 40)
- The Secretariat of the United Nations, United Nations Study No. 11.** By SYDNEY D. BAILEY. (N.Y. Carnegie Endowment for International Peace. 1962. 113 pp.)
- Somali Nationalism.** By SAADIA TOUVAL. (Harvard University Press. 1963. 214 pp. \$4.95)
- State Sovereignty at the Cross Roads.** By DEBIPROSAD PAL. (Calcutta: S. C. Sarkar & Sons (P) Ltd. 1962. 234 pp. £1. 5s. 0d.)
- Soviet Civil Legislation and Procedure.** (Moscow: Foreign Languages Publishing House. 175 pp. SFr. 4.-)
- Literature on Soviet Law.** (Moscow: Index of Bibliography, The Publishing House of the USSR, Academy of Science. 1960. 279 pp. DM 12.50)
- State System of the USSR.** By D. ZLATOPOLSKY. (Moscow: Foreign Languages Publishing House. 199 pp. Fr. 2.45)
- Taxation in India.** WORLD TAX SERIES. (Boston: Harvard Law School, Little, Brown & Co. 1960. 586 pp. \$15.00)
- Trennung von Staat und Kirche.** By ERWIN FISHER. (München: Szczyzny Verlag KG. 1964. 352 pp. DM 22.50)
- L'unification du Droit.** INSTITUT INTERNATIONAL POUR L'UNIFICATION DU DROIT PRIVÉ. (Unification of Law) (Rome: Annuaire 1961, Unidroit, 1962. 479 pp.)

- Civil Rights USA, Public Schools Southern States.** THE UNITED STATES COMMISSION ON CIVIL RIGHTS, STAFF REPORT, 1962. (U.S. Government Printing Office. 215 pp. \$0.75)
- Civil Rights USA, Public Schools North and West.** THE UNITED STATES COMMISSION ON CIVIL RIGHTS, STAFF REPORT, 1962. (U.S. Government Printing Office. 298 pp. \$2.00)
- The United States Commission on Civil Rights. Excerpts from 1961 Report.** (U.S. Government Printing Office. 119 pp. \$0.45)
- Equal Protection of the Laws in North Carolina.** THE UNITED STATES COMMISSION ON CIVIL RIGHTS. REPORT OF THE NORTH CAROLINA ADVISORY COMMITTEE. (U.S. Government Printing Office. 1959-62. 261 pp. \$1.00)
- Freedom to the Free, 1863-1963. A Report to the President.** THE UNITED STATES COMMISSION ON CIVIL RIGHTS. (U.S. Government Printing Office. 1963. 254 pp. \$1.00)
- Verfassungs- und Menschenrechtsbeschwerde Gegen Richterliche Entscheidungen.** By EKKEHARD SCHUMANN. (Berlin: Duncker & Humblot. 1963. 380 pp. DM 48.60)
- Zivilprozessrecht, Erkenntnisverfahren.** By A. BLOMEYER. (Berlin: Springer-Verlag. 1963. 785 pp. DM 79.00)

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The African Conference on the Rule of Law (June 1961): Report on the first African Conference on the Rule of Law, held in Lagos, Nigeria, January 1961.

The Berlin Wall: A Defiance of Human Rights (March 1962): The Report consists of four parts: Voting with the Feet; Measures to Prevent Fleeing the Republic; the Constitutional Development of Greater Berlin and the Sealing off of East Berlin. For its material the Report draws heavily on sources from the German Democratic Republic and East Berlin: their Acts, Ordinances, Executive Instruments, published Court decisions and excerpts from the press.

South African Incident: The Ganyile Case (June 1962): This Report records another unhappy episode in the history of the arbitrary methods employed by the Government of South Africa. In publishing this report the Commission seeks to remind its readers of the need for unceasing vigilance in the preservation and assertion of Human Rights.

Cuba and the Rule of Law (November 1962): Full documentation on Constitutional legislation and Criminal Law, as well as background information on important events in Cuban history, the land, the economy, and the people; Part Four includes testimonies by witnesses.

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Report on the Events in Panama, January 9-12, 1964, (May 1964): A report by the Investigating Committee appointed by the International Commission of Jurists.

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